# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~323.~~ 124

SAMUEL DOLTON, PLAINTIFF IN ERROR,

vs.

AARON CAIN AND HENRY COOMS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED DECEMBER 5, 1870.

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1 Pleas in the circuit court of the United States of America for the southern district of Illinois, at a term begun and held at Springfield, in said district, on the first Monday of June, in the year of our Lord one thousand eight hundred and sixty-eight, and of our independence the ninety-second year.

Present, the Hon. Samuel H. Treat, district judge of said district, and pro tempore sole judge of said circuit court in the absence of the Hon. David Davis, one of the justices of the Supreme Court of the United States of America, assigned to and presiding in said judicial circuit.

SAMUEL DOLTON
*v.*
AARON CAIN AND HENRY COOMS. } In ejectment.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

2 Samuel Dolton, a citizen of the State of New York, plaintiff, puts in his place E. W. Hazard, esqr., his attorney, against Aaron Cain and Henry Cooms, defendants, citizens of the State of Illinois, and residents of the said southern district of said State, who put in their place Alexander E. Wheat, esq., their attorney, in a plea of trespass and ejectment.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that, on the fourteenth day of June, in the year of our Lord one thousand eight hundred and sixty-five, the said plaintiff, by his said attorney, filed in the said court his bond for costs and declaration in ejectment against the said defendants, together with a notice in writing thereto attached, and affidavit of a due service of said declaration and notice upon the said defendants; which said bond for costs, declaration, notice, and affidavit, are in the words and figures as follows, to wit:

UNITED STATES OF AMERICA,
*Southern District of Illinois, ss:*

Circuit court, June term, A. D. 1865.

3 SAMUEL DOLTON
*vs.*
AARON CAIN, HENRY COOMS. } In ejectment.

I do hereby enter myself security for costs in this cause, and acknowledge myself bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party, or to any of the officers of this court, in pursuance of the laws of this State, and of the United States.

Dated this 1st day of May, 1865.

JAMES M. RIDLEHUBER,
Per E W. HAZARD.
E. W. HAZARD.

(Indorsed:) Filed June 14th, A. D. 1865. P. P. Enos, clerk.

UNITED STATES OF AMERICA,
*Southern District of Illinois, ss:*

United States circuit court, June term, A. D. 1865.

Samuel Dolton, who is a citizen of the State of New York, by E. W.

Hazard, *who is a citizen of the State of New York, by E. W. Hazard*, attorney, complains of Aaron Cain and Henry Cooms, who are citizens of the State of Illinois, in a plea of trespass and ejectment: For that whereas, heretofore, to wit, on the twenty-fifth day of March, in the year eighteen hundred and sixty-five, (A. D. 1865,) at and within the county of Adams, and State of Illinois, the said plaintiff was possessed as of his own demense, in fee simple, of a certain tract or parcel of land, with the appurtenances, situate in the county of Adams, in the said State of Illinois, and described as follows, to wit: The south-west quarter of section ten, (10,) in township two north, and of range seven (7) west of the fourth principal meridian, which said premises exceed in value the sum of five hundred dollars, and which the said plaintiff claims in fee simple. And the said plaintiff being so possessed thereof, the said defendants, afterwards, to wit, on the same day and year last aforesaid, entered the said premises and ejected the said plaintiff therefrom, and from the time last aforesaid have unlawfully withheld, and do now unlawfully withhold from the said plaintiff the possession thereof, to the damage of the said plaintiff of the sum of five hundred dollars; and therefore he brings suit, etc.

E. W. HAZARD,
*Att'y for Plaintiff.*

[Rev. stamp 50c. cancelled.]

(Indorsed:) Filed June 14, 1865. P. P. Enos, clerk.

To Aaron Cain and Henry Cooms, the above-named defendants:

You are hereby notified that the declaration, with a copy of which you are now herewith served, and to which this notice is attached, will be filed in the circuit court of the United States for the southern district of Illinois, on the first day of the June term thereof, A. D. 1865, and that upon filing the same, a rule will be entered requiring you to appear and plead to the said declaration within twenty days after the entry of said rule; and that if you neglect so to appear and plead, a judgment by default will be entered against you, and the plaintiff will recover possession of the premises specified in said declaration.

Dated this 28th day of March, A. D. 1865.

E. W. HAZARD,
*Att'y for Plaintiff.*

(Indorsed:) Filed June 14, 1865. P. P. Enos, clerk.

STATE OF ILLINOIS,
*Knox County, City of Galesburg, ss:*

Personally appeared before me, the undersigned, a notary public in and for said city, county, and State, Marshall C. Hazard, who being duly sworn according to law upon his oath says that he served the above declaration on the 28th day of March, A. D. 1865, by leaving a copy with each of the above-named defendants, Aaron Cain and Henry Cooms.

MARSHALL C. HAZARD.

Sworn to and subscribed before me this 24th day of April, A. D. 1865.

[L. S.]

J. P. BOGGS,
*Notary Public.*

[5-cts. rev. stamp, cancelled.]

(Indorsed:) Filed June 14, 1865. P. P. Enos, clerk.

7 Afterwards, to wit, at a term of the said circuit court, begun and held at Springfield in said southern district of Illinois, on the first Monday of June, in the year of our Lord one thousand eight hundred and sixty-five, and on the ninth day of said term, being the fourteenth day of said June, the following proceedings were had and entered of record in said entitled cause, to wit:

SAMUEL DOLTON
*vs.*
AARON CAIN AND HENRY COOMS. } In ejectment.

Now comes the plaintiff, by E. W. Hazard, esq., his attorney, and files his declaration in ejectment against the defendants, together with a notice in writing thereto attached, and also an affidavit of a due service of a true copy of said declaration and notice upon the defendants; and upon reading and filing the same, it is ordered by the court, on motion of the plaintiff by his attorney, that the cause be docketed, and
8 the defendants be ruled to plead thereto within twenty days, or that their default be entered, and this cause be continued.

Afterwards, to wit, on the twenty-third day of said month of June, being the twenty-first day of said June term of the year last aforesaid, the following further proceedings were had and entered of record in said entitled cause, to wit:

SAMUEL DOLTON
*vs.*
AARON CAIN AND HENRY COOMS. } In ejectment.

Now come the defendants, by A. E. Wheat, esqr., and enter their motion to vacate the rule entered herein, on the fourteenth day of June, instant, at the present term, on the insufficiency of the affidavit to the service of a copy of the notice attached to plaintiff's declaration in this cause.

Afterwards, to wit, at an adjourned term of said circuit court,
9 begun and held at Springfield, in said district, on the twenty-fifth day of September, in the year of our Lord one thousand eight hundred and sixty-five, and on the ninth day of said term, being the fourth day of the month of October, of the year last aforesaid, the following further proceedings were had and entered of record in said entitled cause, to wit:

SAMUEL DOLTON
*vs.*
AARON CAIN ET AL. } In ejectment.

On motion it is ordered by the court that this cause be continued.

Afterwards, to wit, at a term of said court, begun and held at Springfield, in said district, on the first Monday of January, in the year of our Lord, one thousand eight hundred and sixty-six, and on the fifth day of said term, being the fifth day of said month of January, the fol-
10 lowing further proceedings were had and entered of record in said entitled cause, to wit:

SAMUEL DOLTON
*vs.*
AARON CAIN ET AL. } In ejectment.

By agreement of the parties, by their attorneys, it is ordered by the court that the rule to plead, herein heretofore entered, be vacated and set aside, and that the declaration be refiled this day, and this cause be treated in all respects as if originally commenced this day; and it is further ordered that this cause be continued, whereupon the defendants file their pleas herein.

Now, on said fifth day of said term, being the fifth day of said January, of the year aforesaid the defendant Aaron Cain, by his attorney, Alexander E. Wheat, esq., files his plea in the words and figures, as follows, to wit:

UNITED STATES OF AMERICA,
*Southern District of Illinois, ss:*
11 Circuit court of the United States, June term, A.D. 1865.

AARON CAIN AND HENRY COOMS
*ads.*
SAMUEL DOLTON. } Ejectment.

And now comes the said defendant Aaron Cain, by Alexander E. Wheat, his attorney, and says that he is not guilty of unlawfully withholding the possession of the premises claimed by said plaintiff in his aforesaid declaration, in manner and form as therein alleged; and of this he puts himself upon the country, &c.

ALEXANDER E. WHEAT,
*Att'y for Aaron Cain.*

And the pl'ff doth the like.

HAZARD & PETERS,
*Att'ys for Pl'ff.*

(Indorsed:) Filed June 5th, 1866. P. P. Enos, clerk.

Afterwards, to wit, on said fifth day of said term, the defend-
12 ant Henry Cooms, by his attorney, Alexander E. Wheat, esq., files his plea in the words and figures as follows, to wit:

UNITED STATES OF AMERICA,
*Southern District of Illinois:*

Circuit court of the United States, June term, A. D. 1865.

HENRY COOMS AND AARON CAIN
*ads.*
SAMUEL DOLTON. } Ejectment.

And now comes the said defendant Henry Cooms, by Alexander E. Wheat, his attorney, and says that he is not guilty of unlawfully withholding the possession of the premises in said declaration mentioned, in manner and form as claimed therein; and of this he puts himself upon the country.

ALEXANDER E. WHEAT,
*Att'ys for said Henry Cooms.*

And the pl'ff doth the like.

HAZARD & PETERS,
*Att'ys for Pl'ff.*

(Indorsed:) Filed Jan'y 5, 1866. P. P. Enos, clerk.

13 Afterwards, to wit, at a term of said court begun and held at Springfield, in said district, on the first Monday of June, in the year of our Lord one thousand eight hundred and sixty-six, and on the twenty-first day of said June, being the nineteenth day of said term, the following further proceeding was had, and entered of record in said entitled cause, to wit:

SAMUEL DOLTON
*vs.*
AARON CAIN ET AL. } In ejectment.

Now comes the plaintiff, by E. W. Hazard, esq., his attorney, and also the defendant, by Messrs. Grimshaw and Wheat, their attorneys, and, issue being joined by agreement, and stipulation filed, they waive the intervention of a jury, and for trial put themselves upon the court, and, after the hearing of the evidence and arguments of counsel, the same was submitted. The court, not being sufficiently advised in the premises, takes time to consider.

14 Afterwards, to wit, on the 22d day of said month of June, of the year last aforesaid, being the twentieth day of said term of said court, the following further proceeding was had, and entered of record in said entitled cause, to wit:

SAMUEL DOLTON
*vs.*
AARON CAIN AND HENRY COOMS. } In ejectment

Now come again the parties, by their respective attorneys, and the court having fully considered. and being now sufficiently advised in, the premises, finds the defendants not guilty of withholding from the plaintiff the possession of the real estate and premises described in the plaintiff's declaration.

It is therefore considered and adjudged by the court that the defendants be discharged from this court, and go hence without day, and that they have & recover of the plaintiff their costs by them about their suit in this behalf expended, amounting to the sum of twenty-six dollars and fifteen cents, and that they have execution therefor.

15 It is further ordered by the court that the plaintiff have leave to settle and file a bill of exceptions, to be made a part of the record of this cause, as of the time of the trial thereof, to be settled and filed herein during or before the next January term of this court.

Afterwards, to wit, on the 4th day of June, in the year of our Lord one thousand eight hundred and sixty-seven, being the second day of the June term of said court of the said year, the following proceeding was had, and entered of record in said entitled cause, to wit:

SAMUEL DOLTON
*vs.*
AARON CAIN AND HENRY COOMS. } In ejectment.

Now comes the plaintiff, by B. S. Edwards, esq., his attorney, and moves the court to set aside the judgment rendered in this cause on the twenty-second day of June, A. D. 1866, and for a new
16 trial of the same under the statute; and it appearing to the court that all the costs taxed in said cause have been paid by said plaintiff, it is ordered that said judgment be vacated and set aside, and that a new trial of this cause be awarded. And, on like motion, it is further ordered that this cause be continued.

Afterwards, to wit, on the 7th day of January, in the year of our Lord one thousand eight hundred and sixty-eight, at a term of said court begun and held at Springfield, in said southern district of Illinois, on the first Monday of said January, and on the second day of said term, being the said 7th day of said January, the following proceeding was had, and entered of record in said entitled cause, to wit:

SAMUEL DOLTON
*vs.*
AARON CAIN ET AL. } In ejectment.

17 Now comes the plaintiff, by B. S. Edwards, esq'r., his attorney, and enters his motion that this cause be continued.

Afterwards, to wit, on the 17th day of said January, of the year last aforesaid, being the 16th day of said term of said court, the following further proceeding was had and entered of record in said entitled cause, to wit:

SAMUEL DOLTON
*vs.*
AARON CAIN AND HENRY COOMS. } In ejectment.

Now comes the plaintiff, by B. S. Edwards, esq., his attorney, and also the defendants, by Messrs. Grimshaw and Wheat, their attorneys, and, issue being joined upon stipulation filed, they waive the intervention of a jury, and for trial put themselves upon the court; and the court having heard the evidence and argument of counsel, and not being sufficiently advised in the premises, takes time to consider.

18 Afterwards, to wit, at a term of said court, begun and held at Springfield, in said southern district of Illinois, on the first Monday of July, in the year of our Lord one thousand eight hundred and sixty-eight, and on the third day of July of the year aforesaid, being the twenty-ninth day of said term, the following further proceeding was had and entered of record in said cause, to wit:

SAMUEL DOLTON
*v.*
AARON CAIN AND HENRY COOMS. } In ejectment.

Now comes the plaintiff, by B. S. Edwards, esq., his attorney, and also the defendants, by Messrs. Wheat and Grimshaw, their attorneys,

and, issue having been joined upon stipulation filed, they waive the intervention of a jury, and for trial put themselves upon the court, and, the court having heard the evidence and arguments of counsel, and having fully considered, and being now sufficiently advised in, the
19 premises, finds that the defendants are not guilty of the tress-passes in the plaintiff's declaration therein complained of.

It is therefore ordered and adjudged by the court that the defendants be discharged and go hence without day, and that said defendants have and recover of and from said plaintiff their costs by them about their defence in this behalf expended, amounting to the sum of twenty-six dollars and fifteen cents, and that they have execution therefor.

It is further ordered by the court that the plaintiff have leave to enter a common-law motion for a new trial at the next term, and to perfect a bill of exceptions at that term, if it shall become necessary.

And afterwards, to wit, on the eighth day of January, in the year of our Lord one thousand eight hundred and sixty-nine, came again said plaintiff, by his said attorneys, and filed in said clerk's office his bill of exceptions herein; which said bill of exceptions is in the words and figures following, to wit:

20 In the circuit court of the United States for the southern district of Illinois.

SAMUEL DOLTON
*vs.*
AARON CAIN ET AL.

Be it remembered that this cause was submitted for trial by the court without a jury, upon the following stipulations of the parties to their suit:

*Stipulation.*

In the circuit court of the United States for the southern district of Illinois.

SAMUEL DOLTON
*vs.*
AARON CAINs AND HENRY COOMS.

A jury is hereby waived in said case, and stipulated that the same shall be tried by the court without the intervention of a jury.

(Indorsed:) Filed Jan'y 17, 1868. J. A. Jones, clerk.

And on the trial of this cause the plaintiff, to maintain the issue on his part, introduced in evidence a patent for the tract of land in controversy in this suit, from the United States, dated May 30th, 1818, to Benjamin Stephenson.

2nd. Deed from Benjamin Stephenson to James McGuire, dated
21 Sept. 22d, 1820, regularly acknowledged and recorded.

3d. Deed from James McGuire to Augustus R. Thiriat, as follows:

This indenture, made the sixth day of January, in the year of our Lord one thousand eight hundred and twenty-three, between James

McGuire of the first part, and Augustus R. Thiriat, in trust for Reni M. F. Jacquemart, of the second part, witnesseth: That the said party of the first part for and in consideration of fifty dollars lawful money of the United States to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, and sold, and by these presents does grant, bargain, sell, remise, alien, and confirm unto the said party of the second part, all that certain tract of land, containing one hundred and sixty acres, being the southwest quarter of section ten, of township two north, in range seven west, in the tract appropriated for military bounties in the
22 Illinois territory, by certain letters-patent granted to Benjamin Stephenson by the President of the United States, under the act of Congress passed in and since the sixth day of May, one thousand eight hundred and twelve, dated the thirtieth day of May, one thousand eight hundred and eighteen, as reference thereto will more fully show: To have and to hold the said quarter sections of land, with the appurtenances thereof, unto the said party of the second part, and to his heirs and assigns forever; and the said James McGuire, for himself and his heirs, the above described and hereby granted and released premises and every part thereof with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said party of the first part and his heirs, and against all persons whomsoever lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend.

In testimony whereof I have hereunto set my hand and seal the day and year first above written.

JAMES McGUIRE. [SEAL.]

23 Signed, sealed, and delivered in the presence of—
C. S. WOODHULL.

STATE OF NEW YORK, *City of New York, ss:*

I hereby certify that, on this 7th day of January, 1823, before me came James McGuire, to me known to be the same person described in, and who executed the within indenture and acknowledged that he executed the same as and for his own free act and deed. Finding no alteration therein, I allow it to be recorded.

C. S. WOODHULL,
*Comm'r, under act 24th March*, 1818.

STATE OF ILLINOIS, *Schuyler County, ss:*

I, Thomas J. Kinney, clerk of the circuit court & ex-officio recorder of said Schuyler County, do hereby certify that the foregoing is a full and true copy of the record of deed, & the certificates of the
24 acknowledgment thereof from James McGuire to Augustus R. Theriat as recorded in vol. "B," on page 135, &c., of the State records as appears from said records now in my said office.

Given under my hand and official seal at Rushville, August 22d, 1864.

[SEAL.] THOS. J. KINNEY, *Clerk*,
By E. BENTHOLF, *Deputy*.

[8 cts. revenue stamp cancelled.]

STATE OF NEW YORK,
*City and County of New York, ss:*

I, William C. Conner, clerk of the city and county of New York, and

also clerk of the supreme court of the said city and county, the same being a court of record, do hereby certify that C. S. Woodhull, whose name is subscribed to the above copy of the certificate of the proof or acknowledgment, was at the time of taking such proof or acknowledgment a commissioner under the act of 24 March, 1818, in and for the city and county of New York, dwelling in New York and duly authorized to take the same, and that the aforesaid deed is executed and acknowledged in conformity to the laws of New York.

25 In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county, this 18th day of April, 1866.

W'M G. CONNOR, *Clerk.*

4th. The plaintiff next proved the death of Augustus R. Theriat to have occurred in the year 1845, and the death of Reni M. F. Jacquemart to have occurred in the year 1848.

5th. Deeds regularly acknowledged and recorded from the heirs at law of said Theriat and Jacquemart, deceased, conveying the said tract to the said plaintiff—the deed from the heirs of Jacquemart being dated the 27th day of June, 1864, and from the heirs of Theriat dated on the 17 day of June, 1864.

And closed his case.

The defendants then read in evidence, without objection, except as to their legal effect, the following depositions:

26 Be it remembered that on application of Aaron Cain, one of the defendants in a suit now pending in the circuit court of the United States for the seventh circuit and southern district of Illinois, wherein Samuel Dolton is plaintiff, and said Aaron Cain & one Henry Cooms are defendants, I, Ebenezer B. Barker, a notary public in and for the city of Quincy, in the State of Illinois, have this fifteenth day of May, A. D. 1866, at my office in the city and State aforesaid, having given no notice to the said plaintiff or his attorney, proceeded to examine Peter Hartman and Samuel Miller, both residents of the county of Adams, & State of Illinois, as witnesses on behalf of the said defendants in the aforesaid suit; and I certify that the reason for taking said deposition is, and the fact is, the said witnesses reside at Adams County aforesaid, more than one hundred miles from Springfield, Illinois, the place where the court in which said cause is expected to be tried, is appointed by law to be held; and the reason why notice of the time and

27 place of taking said deposition was not given to the said plaintiff or his counsel is, and the fact is, the said plaintiff out of said State of Illinois, and his counsel reside in the State of Illinois, more than one hundred miles from Quincy, the place where said deposition was taken; and I do further certify that the said Peter Hartman & Samuel Miller, each being by me carefully examined, cautioned, and duly sworn to testify the whole truth, says:

*Deposition of Peter Hartman.*

I am acquainted with Aaron Cain, one of the defendants in the suit above-mentioned, and have known him since the year A. D. 1848. I am also well acquainted with the southwest quarter of section ten, in township two, north of the base line of range seven west of the fourth principal meridian, situate in Adams County, State of Illinois; I am now

residing within one mile of said land, and have resided within such distance to the same for more than twenty years last past. Said Aaron Cain moved upon said quarter section of land and took actual possession thereof, and commenced to reside thereon in person, sometime in the month of February or March, A. D. 1849, and he, the said Aaron
28 Cain, continued in the actual possession of said quarter section of land from the day and year last above named, until sometime about the first of March, A. D. 1862; and from said month of February or March, A. D. 1849, at all times, up to the first of March, A. D. 1862, said Aaron Cain was possessed of said quarter of land by actual residence thereon, in his own person, during the whole of said period. That said Aaron Cain moved from said premises in the spring of A. D. 1862, and about the first of March of said last-named year; since which time said Cain has not resided upon said quarter section of land in person; that when said Aaron Cain moved from said premises, as above stated, one Henry Theiton, as the tenant of said Cain, moved upon said premises, and as such tenant was possessed of the same by residence thereon until the first of March, or thereabouts, of A. D. 1863, when the said Henry Theiton removed off from said premises, and one Henry Cooms took possession of said premises and quarter section of land as tenant
29 of said Aaron, and said Henry Combs continued in possession of said land & premises, and resided thereon until the first of March, A. D. 1864, or thereabouts; since which time other persons, as tenants of said Aaron Cain, have had possession of said land; that said Aaron Cain has been in the actual possession of said quarter section of land, either in his own person, or by his tenants, ever since the month of February or March, A. D. 1849—he, said Cain, or some persons under him, as his tenant, having resided thereon all the time, until March, A. D. 1865. That said Aaron Cain claimed to be the owner of said quarter section of land when he took possession thereof in A. D. 1849, as aforesaid, and continued at all times, from thenceforward up to the present time, and still continues to claim to own said quarter section of land.

PETER HARTMAN.

SAMUEL MILLER says:

I am acquainted with Aaron Cain, one of the defendants in the suit above mentioned, and have known him since the year of our Lord
30 one thousand eight hundred and forty-eight. I am also well acquainted with the southwest quarter of section ten, (10,) in township two north of the base line, of range seven west of the fourth principal meridian, situate in the county of Adams, and State of Illinois. I am now residing within one mile of said land, and have resided within such distance to the same for more than twenty years last past. Said Aaron Cain moved upon said quarter section of land, and took actual possession thereof and commenced to reside thereon some time in the month of February or March, A. D. 1849, and he, the said Aaron Cain, continued in the actual possession of said quarter section of land from the day and year last aforesaid until some time about the first of March, A. D. 1862, and from said month of February or March, A. D. 1849, at all times up to the first of March, A. D. 1862, said Aaron Cain was possessed of said quarter section of land by actual residence
31 thereon, in his own person, during the whole of said period; that said Aaron Cain moved from said premises in the spring of A. D. 1862, and about the first of March of said last-named year, since which time said Aaron Cain has not resided upon said quarter section of land in person; that when said Aaron Cain moved from said premises, as

above stated, one Henry Therton, as the tenant of said Cain, moved upon said premises, and as such tenant was possessed of the same by residence thereon until the first of March or thereabouts of A. D. 1863, when the said Henry Therton removed off from said premises, and one Henry Cooms took possession of said premises and quarter section of land as tenant of said Aaron Cain, and said Henry Cooms continued in possession of said premises, and resided thereon until the first of March, A. D. 1864, or thereabouts, since which time other persons, as tenants of said Cain, have had possession of said land; that said Aaron Cain
32 has been in the actual possession of said quarter section of land, either in his own person or by his tenants, ever since the month of February or March, A. D. 1849; he, said Cain, or some one under him as his tenants, having resided thereon all the time until March, A. D. 1865, and also up to the present time; that said Aaron Cain claimed to be the owner of said quarter section of land when he took possession thereof, in A. D. 1849, as aforesaid, and continued at all times from thenceforward up to the present time, and still continues, to claim to own said quarter section of land.

his
SAMUEL + MILLER.
mark.

And I do further certify that the preceding deposition was reduced to writing by me, and signed separately by the said Peter Hartman and Samuel Miller, in my presence, and that I am not of counsel or attorney for either of the parties to said suit, nor am I interested in the event thereof. Witness my hand and notarial seal this fifteenth day of May, A. D. 1866.

[L. S.] EBENEZER B. BARKER,
*Notary Public for the City of Quincy, Adams County, State of Ill's.*

[5-ct. rev. stamp cancelled]

33 STATE OF ILL'S, *County of Sangamon:*

Be it remembered that, on the application of Aaron Cain, one of the defendants in a suit now pending in the circuit court of the United States for the seventh circuit and southern district of Illinois, wherein Samuel Dolton is plaintiff, and said Aaron Cain and Henry Coons are defendants, I, John A. Hughes, a notary public in and for the township of Springfield, Sangamon Co., in the State of Illinois, have this 8th day of June, A. D. 1866, at the city of Springfield, in the county of Sangamon, and State aforesaid, having given no notice to the said plaintiff or his attorney, proceeded to examine Washington Cockle, of the city of Peoria, in the county of Peoria, in the State aforesaid, as a witness on behalf of the defendants in the aforesaid suit; and I hereby certify that the reason for taking said deposition is, and the fact is, that said
34 witness resides at the city of Peoria, aforesaid, and more than one hundred miles (by the usual railroad route of travel) from Springfield, the place where the court in which said cause is expected to be tried is appointed by law to be held; and the reason why notice of the time and place of taking said deposition was not given to said plaintiff or his counsel is, and the fact is, the said plaintiff resides out of the said State of Illinois, and his counsel resides *resides* in the State aforesaid, more than one hundred miles from Springfield, aforesaid, the place where said deposition was taken.

And I do further certify that the said Washington Cockle, being by

me carefully examined, cautioned, and duly sworn to testify the whole truth, says:

My name is Washington Cockle; I am 55 years of age; I reside in the city of Peoria, Illinois. I was acquainted with Francis R. Tillon and Walter L. Cutting, of the city of New York, in the State of New York. I am the same person named in the letter of attorney executed by said "Tillon and Cutting," dated the 20th day of September,
35 A. D. 1847, whereby they created me, or undertook to create me, by substitution, an attorney-in-fact of Rene Marie Ferdinand Jacquemart, and Madama Adéle Louise Daulert d' Egligney, his wife. The said Tillon executed said letter of power of substitution by the signature of F. R. Tillon and said Walter L. Cutting, by the signature of W. L. Cutting, acting under *under* said letter of substitution, and the original power of attorney from said Jacquemart and wife to said Tillon and Cutting; and by virtue of the power, as I supposed in me vested, I sold to Aaron Cain the southwest quarter of section ten, in township two, north of the base line of range seven, west of the fourth principal meridian, situated in the county of Adams, in the State of Illinois, on the 29th day of July, A. D. 1848, for the sum of three hundred dollars. I made said sale as the attorney-in-fact for said Rene M. F. Jacquemart and his said wife. Said Cain paid me on said day of sale one hundred dollars of said purchase money, and afterwards (the precise time of which I cannot now remember) he paid me one
36 hundred and thirty four dollars more of said purchase money; the purchase money so paid me by said Cain I afterwards paid over in payment of taxes on lands belonging to said Rene M. F. Jacquemart, under instructions received from said Tillon and Cutting on said day of sale. And, for said Rene M. F. Jacquemart, I executed and delivered to said Cain a bond for said premises, bearing date on said day of sale, intending to execute the same in the true name of said Jacquemart, but by inadvertence and mistake I signed the name of Jean Jacquemart *Jacquemart* to said bond. Within a short time after said sale, and not to exceed one month, I reported said sale and the terms thereof to said Tillon and Cutting, whereupon they immediately approved and ratified the same.

WASHINGTON COCKLE.

And I do further certify that the preceding deposition was reduced to writing by me, and signed by the said Washington Cockle in my presence, and that I am not of counsel or attorney for either of
37 the parties to said suit, nor am I interested in the event thereof. Witness my hand and notarial seal this 8th day of June, 8*th* A. D. 1866.

[L. S.] JOHN A. HUGHES,
*Notary Public.*

[5-c't rev. stamp, cancelled.]

Be it remembered that on application of Aaron Cain, one of the defendants in a suit now pending in the circuit court of the United States' for the seventh circuit and southern district of Illinois, wherein Samuel Dolton is plaintiff, and said Aaron Cain and Henry Cooms are defendants, I, Ebenezer B. Barker, a notary public in and for the city of Quincy, in the State of Illinois, have this 28th day of May, A. D. 1866, at Quincy, in the county and State aforesaid, having given no notice to the said plaintiff or his attorney, proceeded to examine Aaron Cain, one of the defendants in said cause as witness on behalf of the de-

fendants in the aforesaid suit, and I certify that the reason for taking said deposition is, and the fact is, the said witness resides at Ad-
38 ams County, in the State of Illinois, aforesaid, more than one hundred miles from Springfield, the place where the court in which said cause is expected to be tried is appointed by law to be held; and the reason why notice of the time and place of taking said deposition was not given to the said plaintiff or his counsel is, and the fact is, the said plaintiff resides out of the State of Illinois, & his counsel resides in the State of Illinois, more than one hundred miles from Quincy, the place where said deposition was taken.

And I do further certify that the said Aaron Cain being by me carefully examined, cautioned, and duly sworn to testify the whole truth, says:

My name is Aaron Cain, and I am one of the defendants in the said above-mentioned , wherein Samuel Dolton is plaintiff and Henry Cooms & Aaron Cain are defendants. I purchased the southwest quarter of section ten, in township two north of the base line of range seven west of the fourth principal meridian, situate in the county of Adams,
39 and State of Illinois, from one Jacquemart, whose Christian name was Jean Ferdinand, as I was then informed and verily believe, truly. I made said purchase of said land from said Jacquemart through one Washington Cockle, as the agent and attorney-in-fact of said Jacquemart. I made said purchase in good faith, and paid to said Cockle at the time of said purchase the sum of one hundred dollars, or thereabouts, of the purchase money for said land. At the time of said purchase I believed said Jacquemart was the owner of said land, and that said Cockle was his legally appointed attorney-in-fact, and had full authority from said Jacquemart to make said sale, and still believe so. In the early part of the year of our Lord 1849, and either in the month of February or March of said last-named year, I moved upon and took actual possession of said land under said purchase. And I actually resided upon said land in my own person, and had and held pos-
40 session thereof, and used and occupied the same as my residence and homestead from the time I so moved upon the same, in A. D. 1849, at all times from thenceforward until the spring of the year of our Lord 1862. In the spring of A. D. 1862, I leased said land to one Henry Teton for the period of one year from March 1st, A. D. 1862. Immediately upon my moving off from said land as aforesaid, said Henry Teton moved upon said premises and took possession thereof, and resided upon said land as my tenant from the time he so took possession thereof until the first day of March, A. D. 1863, or thereabouts, when said Henry Teton moved off from said premises, previous to which last mentioned time I had leased said land to one Feland. Said Feland moved upon said land in the spring of 1863, and immediately after said Henry Teton moved therefrom, as my tenant. And said Feland, as my tenant, resided upon and held and had the actual possession
41 of said land from the time he so moved thereon, in A. D. 1863, until on or about the first day of March, A. D. 1864, when he moved therefrom. Previous to the time said Feland moved from said premises as last aforesaid, and in the year last aforesaid, I leased said land to one Henry Cooms, and said Henry Cooms in the spring of A. D. 1864, and immediately after said Feland moved therefrom as aforesaid, as my tenant moved upon and took actual possession of said premises *as my tenant*, and as such tenant said Henry Cooms continued to reside upon said land, and had actual possession of said land until the first day of March, A. D. 1865, or thereabouts, when he moved there-

from; and from which said last-named period other persons, as my tenants and under me, have had and held, and still have actual possession of said land. By myself and my tenants as aforesaid, I have had actual possession as aforesaid, of said land at all times since the
42 month of February or March, A. D. 1849. I have at all times since the 29th day of July, A. D. 1848, hitherto claimed, and still do claim in good faith to be the owner of said land. I, so claiming to be the owner of said land, paid all the taxes assessed on said lands and tenements for the following named years of our Lord, viz: 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857, 1858, 1859, 1860, 1861, 1862, 1864, and 1865, to the proper officer entitled by law to receive and collect the same. I went to pay the taxes thereon for the year of our Lord 1863, but found they had been previously paid by some person to me unknown.

AARON CAIN.

And I do further certify, that the preceding deposition was reduced to writing by me, and signed by the said Aaron Cain in my presence, and that I am not of counsel or attorney for either of the parties to said suit, nor am I interested in the event thereof.

43 Witness my hand and notarial seal this 28th day of May, A. D. 1866.

[L. S.] EBENEZER B. BARKER,
*Notary Public for the City of Quincy, Adams County, Illinois.*

[5-ct. rev. stamp cancelled.]

Mr. René Marie Ferdinand Jacquemart, proprietair, formerly a manufacturer of colored paper, and Madame Adéle Louise Doulcet d'Egligny, his wife, who acts by the permission of her husband, they both residing together at Paris in the Rue de Montreuil No. 39 Faubourg Saint Antoine, and at the present time at the establishment Thermal de Englien les bains (Seine et Ouse.) The said Sieur Jacquemart, acting in these presents as well in his own personal name as in the name, and for the purpose of assisting and authorizing the said Mad'm Jacquemart, his wife, who have, by these presents each one for themselves, made and contributed as their attorneys general and special, for the purposes hereinafter named, Messrs. Francis R. Tillon and Walter L. Cutting, comprising the partner-
44 ship, house, or firm of Tillon & Cutting, residing at New York, lawyers, to act either jointly or separately, the one in the absence of the other, and in consequence whereof to each one of whom they give each one as far as regards him or her, power for them and in their names to sell in legal form to such persons, and at such prices, charges and conditions as the said attorneys shall think advisable, the entire or only a part of all sorts, pieces, parcels or portions of land situated in the State of Illinois, in the United States of America, which Mr. and Mad'me Jacquemart at present own, or may hereafter become possessed of, and in which State the said constituants now have, or may hereafter have, interests of any kind soever to be protected, in order to effect the said sales either amicably or at public auction, to sign the contracts of sale in the respective names of the constituents, to seal, make and execute, deliver, and acknowledge in the prescribed forms to the profit of whomsoever it may concern the entire and legitimate convey-
45 ance in legal form of all or a part of the above-mentioned real estate. In the deeds of sale or transfer to insert all or a part of the clauses and agreements usually contained in full warranty deeds

having reference to lands in fee-simple in the said State of Illinois to make, execute, sign, and deliver in proper legal form all contracts or other agreements for the sale of all or a part of the said lots, pieces or portions of land, and to insert therein all stipulations or agreements which the attorneys, or either of them alone, may deem advisable; to receive all sums and amounts in payment therefor, which from time to time shall be given or paid on account of the pieces of land thus sold or transferred, or which, according to agreement, are to be sold or transferred; to receive the same, and to give receipts therefor. In like manner to receive all sums for interest arising or to arise from the sums which shall, or may be, received for the said property either for the whole or a part of the said contracts, or the debts there contracted; likewise to receive and foreclose all bonds and mortgages in
46 proper legal form which shall be taken or *or* received on the sale of all or a part of the said lands; to cause all the said bonds and obligations to be recorded, and after they shall have been paid to cause the same to be satisfied on record; to pay all contributions on the said lands; to take possession thereof, and by all legal means to oppose all injuries and disturbances, and generally to watch over, improve, and administer them, with full power for that purpose to receive all rents due or to become due on the said lands, and with full power for that purpose to sign, seal, make, execute and deliver all documents, papers or instruments generally, of every description, requisite or that shall be necessary for the attainment of the ends hereinbefore recited; to open, continue, defend, or discontinue all actions or suits at law or otherwise; to transact, compromise or submit the points in difference to arbitration, and for the attainment of the ends hereinabove-mentioned to do every other thing whatsoever which may be needful and
47 necessary; with full power of substitution and revoking such substituted attorneys. It is to be understood that the said substituted attorneys shall only have power to make and execute or deliver any deed after the price or value thereof shall have been received by the original attorneys or by one of them, and that the parties contracting for the purchase of said lands shall only be legally discharged and released therefrom by the receipt and discharge of the attorneys by these presents constituted, or one of them, declaring that Mr. and Mad'me Jacquemart act the constituents, ratify from this present moment all that the said attorneys, or either of them, or their substitutes, shall have done or cause to be done by virtue of these presents.

This instrument was made and executed at the establishment Thermal D'Engluen les Bains, (Seine et Oui,) where Mr. and Mad'me St. Réné Jacquemart are at the present time, on the seventh day of August, in the year one thousand eight hundred and forty-seven. And after the same had been read, Mr. and Madame Saint Réné Jacquemart
48 affixed their signatures thereto, together with the notaries. Two words erased as null and void in the body of this instrument.

A. L. D. D.
A. L. DOULCET D'EGLIGNY,
*Marechal.*

R. JACQUEMART,
*Chandru.*

Examined for the purpose of proving legal the signatures of Messrs. Marechal and Chandru, notaries at Paris by us, judges, the president of the civil tribunal of the Seine being presented.

Paris, August 10th, 1847.

CH. BOURGAIN. [L. S.]

Examined for the purpose of proving legal the signatures of Mr. Bourgain, a judge of the civil tribunal of Paris. Paris, August 11th, 1847. By delegation, the chief of the bureau of the office of the ministers of justice.

LANDY. [L. S.]

Recorded at Paris, in the 6th bureau, on the 10th day of August, one thousand eight hundred and forty-seven, in vol. 202, fol. 162.—Vol.
49 2.—Received four francs and forty centimes for a tenth. $4 50.

BAUS.

KINGDOM OF FRANCE,
*City of Paris:*

CONSULATE OF THE UNITED STATES OF AMERICA, PARIS.

The within signature "Landy," duly authenticated at this consulate. In testimony whereof I have hereunto set my hand and seal of office this 12th day of August, in the year of our Lord, 1847.

ROBERT WALSH, U. S. C. [SEAL.]

KINGDOM OF FRANCE,
*City of Paris:*

CONSULATE OF THE UNITED STATES OF AMERICA.

I, the undersigned, consul of the United States of America for the city of Paris, do hereby certify that, on this sixteenth day of August, A. D. 1847, Réné Marie Ferdinand Jacquemart, and Adéle Louise Doulcet D'Egligny his wife, known to me to be the identical individuals
50 named in, and who executed the within letter of attorney, personally appeared before me, and severally acknowledged the said letter of attorney by them subscribed, to be their free act and deed, for the purpose therein mentioned; and the said Adéle Louise Doulcet D'Egligny, being of full age, and by me duly examined separate and apart from her said husband, and the contents of said letter of attorney being fully made known to her, declared she did voluntarily sign, seal, and execute the same without any coercion or compulsion of her said husband.

In testimony whereof I have hereunto set my hand and seal of office this said sixteenth day of August, in the year of our Lord, 1847.

[SEAL.] ROBERT WALSH,
*U. S. Consul.*

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

James Monagh, of said city, counselor at law, being duly sworn, deposes and says that he understands the French and English lan-
51 guage; that the foregoing document is a correct translation from the French language in the English language, of a paper which purports to be a duly authenticated letter of attorney, and of the certificates thereto attached. And this deponent further says, that the copy of the United States consul's certificate at foot of said document, is an exact transcript of an original certificate annexed to said letter of attorney.

JAMES MONAGH.

Sworn before me this 20th day of September, 1847.

STATE OF NEW YORK,
*City and County of New York, ss:*

On the day of the date hereof, before me, the subscriber, a commissioner in and for the State of New York, appointed by the governor of the State of Illinois, with full power and authority to take the acknowledgment and proof of deeds and other instruments of writing, under seal, to be used or recorded in the said State of Illinois, duly com-
52 missioned and sworn, residing in the city of New York, personally came and appeared James Monagh, esq., the above-named deponent, who being by me duly sworn according to law, did depose to the truth of the above affidavit.

In testimony whereof I have subscribed my name and affixed my seal of office at the city of New York, this twentieth day of Sept., 1847.

JOSEPH C. LAWRENCE,
*Commissioner, &c., for the State of Illinois.*

The defendants then read in evidence, without objection, except as legal effect, letter of substitution by Tillon & Cutting, to Washington Cockle, as follows:

To all whom these presents shall come, we, Francis R. Tillon and Walter L. Cutting, send greeting:

Whereas Réné Marie Ferdinand Jaquemart and Madame Adélé Louise Doulcet D'Egligny, his wife, by their letter of attorney in the
53 French language, a true, full, and correct translation whereof into the English language is hereunto annexed, did constitute us his attorneys, for the purposes and with the powers in the same letter of attorney at large contained. Now, know ye, that we, the said Francis R. Tillon and Walter L. Cutting, by virtue hereof and the power of substitution in said letter of attorney appearing, have substituted and deputed, and do substitute and depute, Washington Cockle, of Peoria, in the State of Illinois, counsellor at law, to be the lawful and sufficient attorney of the said Réné Marie Ferdinand Jacquemart and Adele Louise Doulcet D'Egligny, his wife, with all and every power and authority of acting in the same stead and to the use of the said Réné Marie Ferdinand Jacquemart and Adelé Louise Doulcet D'Egligny, granted to us by the said letter of attorney, which we can lawfully exercise and delegate, hereby ratifying and confirming whatsoever the said Washington Cockle shall lawfully do in the name of the said Réné Marie Ferdi-
54 nand Jacqemart and Adele Louise Doulcet D'Egligny, his wife, or in our names as attorneys to the said Réné Marie Ferdinand Jacquemart and Adélé Louise Doulcet D'Egligny, his wife, to the use of the said Réné Marie Ferdinand Jaquemart and Adele Louise Doulcet D'Egligny, his wife, by virtue of these presents and the power substitution in said letter of attorney contained.

In witness whereof we have hereunto set our hands and seals the twentieth day of September, 1847.

F. R. TILLON. [SEAL.]
W. L. CUTTING. [SEAL.]

Sealed and delivered in presence of—
JAMES MONAGH.
JOSEPH C. LAWRENCE.

STATE OF NEW YORK,
*City and County of New York, ss:*

Be it remembered that, on the twentieth day of September, A. D. 1847, before me, the subscriber, a commissioner in and for the State of New York, appointed by the governor of the State of Illinois, with
55 full power and authority to take the acknowledgment and proof of deeds and other instruments of writing, under seal, to be used or recorded in said State of Illinois, and to administer oaths, duly commissioned and sworn, residing in the city of New York, personally came and appeared Francis R. Tillon and Walter L. Cutting, who are personally known to me to be the individuals described in and who executed the within letter of substitution, and acknowledged to me that they had executed the same.

In testimony whereof I have subscribed my name and affixed my seal of office the day and year above written.

[L. S.] JOSEPH C. LAWRENCE,
*Commissioner of Deeds for the State of Illinois, 82 Wall St.*

The defendant then read in evidence without objection except as to its legal effect, bond from Jacquemart, by Cockle as attorney, to defendant Cain, as follows:

56 Know all men by these presents that I, Jean Ferdinand Jacquemart, of France, by Washington Cockle, of the county of Peoria, in the State of Illinois, my attorney, am held and firmly bound unto Aaron Cain of the county of Adams in the State of Illinois, in the penal sum of six hundred dollars, lawful money of the United States, to the payment of which well and truly to be made, I bind myself, my heirs, executors and administrators firmly by these presents, sealed with my seal, dated at Peoria this 29th day of July 1848.

The condition of the above obligation is such that whereas the said Aaron Cain hath purchased from the said Jean Ferdinand Jacquemard the following-described tract of land situated in Adams County aforesaid, viz: the southwest quarter of section number ten, in township number two north, of range number seven west of the fourth meridian (No. 10, 2 N., 7 W.) for the sum of three hundred dollars, and made payment of one hundred dollars of the principal money and given
57 his three notes of hand for the residue payable as follows, to wit: one for sixty-eight dollars in one year from 1st of November next, one for sixty-six dollars in two years from that date, and one other for sixty-six dollars in three years from same time, all bearing interest from date hereof and payable at Peoria, and has agreed to pay all taxes hereafter to become payable on the same land. Now provided the said Aaron Cain shall pay or cause to be paid the said sums of money on the days specified and appointed for the payment thereof and said taxes, and the said Jean Ferdinand Jacquemard shall, upon full payment of the purchase money aforesaid, make, execute, and deliver to the said Aaron Cain, or his assignee, a warranty deed of conveyance for said premises in fee simple with the usual covenants, then this obligation to be void; otherwise to remain in full force and virtue. It is however
58 understood that the said Aaron Cain is, at his own costs, to purchase or otherwise obtain possession of the improvements on the premises on the above-described lands.

JEAN FERDINAND JACQUEMARD,
[SEAL.] By WASHINGTON COCKLE,
*His Attorney through substitution per Tillon & Cutting.*

The defendant, Aaron Cain, further testified on the trial as follows: "That he paid $100 of the purchase money to Cockle; at this time he purchased the land, and also paid all the deferred payments to said Cockle as same became due, except the last; that at or very soon after the maturity of the last deferred payment he offered to pay same to Cockle, but the latter refused to receive the same for reason that he had heard rumors that Jacquemart was dead; that he had always been ready and willing to pay same, but did not know who was entitled to receive same."

The defendant also offered and read in evidence, without objection, except as to legal effect, the following sections of the statutes of
59 Illinois: Sec. 8, chap. 66, Revised Statutes of 1845:

"Every real, possessory, ancestral or mixed action, or writ of right, brought for the recovery of any lands, tenements, or hereditaments of which any person may be possessed by actual residence thereon, having a connected title in law or equity, deducible of record from this State or the United States, or from any public officer or other person authorized by the laws of this State to sell such land for the non-payment of taxes, or from any sheriff, marshal, or other person authorized to sell such land on execution, or under any order, judgment, or decree of any court of record, shall be brought within seven years next after possession being taken as aforesaid; but when the possessor shall acquire such title, after taking such possession, the limitation shall begin to run from the time of acquiring title."

And also sec. 11, chap. 66, Revised Statutes of 1845, of Illinois:
60 "No person who has or may have any right of entry into any lands, tenements, or hereditaments, of which any person may be possessed by actual residence thereon, having a connected title in law or equity, deducible of record, from this State or the United States, or from any public officer or other person authorized by the laws of this State to sell such lands for non-payment of taxes, or from any marshal, or other person authorized to sell such land on execution, or under any order, judgment, or decree of any court of record, shall make any entry thereon, except within seven years from the time of such possession being taken. The possessor shall acquire such title after the time of taking such possession. The limitation shall begin to run from the time of acquiring title."

Also, sec. 8, chap. 24, Revised Statutes of 1845:

"Every person in the actual possession of lands or tenements under claim and color of title made in good faith, and who shall, for
61 seven successive years, continue in such possession, and shall also, during said time, pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements to the extent and according to the purport of his or her paper title. All persons holding under such possession by purchase, devise, or descent, before said seven years shall have expired, and who shall continue such possession, and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section."

This was all the evidence in the case.

The court found the issue for the defendants and rendered judgment for defendants, to which the plaintiff at the time excepted, and now presents his bill of exceptions to be signed and sealed by the court, which is done.

S. H. TREAT. [SEAL.]

By agreement of counsel, the patent and deeds referred to, and not copied into this bill of exceptions, are omitted, those only being
62 inserted on which it is desired to make any points in the argument.

STUART, EDWARDS & BROWN,
*For Plaintiff.*

(Indorsed:) Filed January 8th, 1869. J. A. Jones, cl'k.

And afterwards, to wit, on the thirteenth day of June, in the year of our Lord one thousand eight hundred and seventy, a writ of error was issued in said entitled cause, which said writ of error is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss*:

The President of the United States to the judges of the circuit court of the United States for the southern district of Illinois, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the circuit court before you between Samuel Dolton, plaintiff, and Aaron Cain and Henry Cooms, defendants, a manifest error hath happened to the great damage of the
63 said Samuel Dolton, as by his complaint appears: We being willing that the error, if any *if any* there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the first Monday of the next term thereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this thirteenth day of June, in the year of our Lord one thousand eight hundred and seventy, and of our independence the ninety-fourth.

[SEAL.]

J. A. JONES,
*Clerk of the Circuit Court of the United States, for the Southern District of Illinois.*

64 Then, afterwards, to wit, on the sixteenth day of June of the year last aforesaid, came again said plaintiff, by his said attorneys, and filed his bond of appeal herein, which said bond of appeal is in the words and figures following, to wit:

Supreme Court of the United States.

SAMUEL DOLTON
*v.*
AARON CAIN AND HENRY COONS. } In ejectment.

Know all men by these presents that Samuel Dolton, as principal, and Alvin N. Lancaster, as surety, are held and firmly bound unto Aaron Cain and Henry Coons in the sum of five hundred dollars, to be paid to

the said Aaron Cain and Henry Cooms, their executors or administrators; to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this thirteenth day of June, A. D. 1870.

65 Whereas the above-named Samuel Dolton has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit, by the circuit court of the United States for the southern district of Illinois: Now, therefore, the condition of this obligation is such, that if the above-named Samuel Dolton shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

SAM'L DOLTON. [SEAL.]
ALVIN N. LANCASTER. [SEAL.]

Sealed and delivered in presence of—
GEORGE P. WELLS.
AARON P. MEAD.

Approved:

S. H. TREAT,
*Dist. Judge.*

(Indorsed:) Filed June 16th, 1870. J. A. Jones, cl'k.

Then afterwards, to wit, on the said thirteenth day of June, of the year last aforesaid, a citation was issued herein, which said citation, with the return of the marshal thereon indorsed, is in the words and figures following, to wit:

66 UNITED STATES OF AMERICA, *ss:*

To Aaron Cain and Henry Cooms, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday of the next term thereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein Samuel Dolton is the plaintiff, and you are the defendants in error, to show cause, if any there be, why the judgment, in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness Samuel H. Treat, district judge of the United States for the southern district of Illinois, and one of the judges of the circuit court of the United States for said district, this thirteenth day of June, in the year of our Lord one thousand eight hundred and seventy, and of our independence the ninety-fourth.

S. H. TREAT.

67 I hereby appoint E. K. Aldrich, my special deputy to execute this writ. Aug. 9th, 1870.

JOHN L. ROSETT,
*U. S. Marshal.*

Executed the within citation by reading and delivering true copies of

the same to Jackson Grimshaw and A. E. Wheat, attorneys of the respondents herein. Aug. 12, 1870.

JOHN L. ROSETT, *U. S. M.*,
By E. K. ALDRICH, *Special Dep'ty.*

I hereby appoint Benjamin Seymour my special deputy to execute this writ. Aug. 22d, 1870.

JOHN L. ROSETT,
*U. S. Marshal.*

I hereby return this citation, and certify that I have been unable to find the within-named Henry Cooms, in my district, this 25th day of August, 1870.

JOHN L. ROSETT,
*U. S. Marshal,*
By JA'S E. HILL, *Dep'ty.*

Executed the within citation on the 24th day of Aug., 1870, by reading & delivering a true copy of the same to the within-named Aaron Cain.

JOHN L. ROSETT,
*U. S. Marshal,*
By BENJ. SEYMOUR,
*R. M. Special Deputy.*

Service, $6 00; copies, 60; mileage, 19 56—$26 16.

(Indorsed:) Circuit court United States, southern district of Illinois. Samuel Dolton, appellant, v. Aaron Cain and Henry Cooms, respondents. Citation. Filed August 26th, 1870. J. A. Jones, cl'k.

68 UNITED STATES OF AMERICA,
*Southern District of Illinois, ss:*

[5-c. int. rev. stamp affixed and canceled.]

I, J. A. Jones, clerk of the circuit court of the United States in and for the southern district of Illinois, do hereby certify the foregoing to be a full, true, and complete transcript of the papers and proceedings in a certain cause, wherein Samuel Dolton is plaintiff, and Aaron Cain and Henry Cooms are defendants, as fully, truly, and completely as the same are of file and record in my said office.

In witness whereof I have hereunto set my hand and official seal at Springfield, in said district, this thirtieth day of August, in the year of our Lord, one thousand eight hundred and seventy, and of our independence the ninety-fifth.

[SEAL.] J. A. JONES, *Clerk.*

In the Supreme Court of the United States.

69 Error to the circuit court of the United States for the southern district of Illinois.

SAMUEL DOLTON
*vs.*
AARON CAIN AND HENRY COONES.

Elliott C. Davidson, being duly sworn, saith that he resides at Gales-

burg, Illinois; that his age is 37 years; that he is accquainted with the land in controversy in the above-entitled suit, to wit, the southwest quarter section ten, (10,) in township two (2) north, and of range (7) west of the fourth principal meridian, situate in the *in the* county of Adams, in the State of Illinois; and, at the time the judgment was rendered in the said circuit court of the United States for the southern district of Illinois, to wit, on the third day of July, A. D. 1868, said tract of land was, and still is, of the value of over two thousand dollars.

ELLIOTT C. DAVIDSON.

Sworn to before me, & subscribed in my presence, this 27th day of April, A. D. 1870.

[SEAL.] JAMES R. LANCASTER,
*Notary Public Kings Co.*

(Indorsement on cover:) No. 323. (323.) Samuel Dolton, plaintiff in error, vs. Aaron Cain and Henry Cooms. S. Illinois, C. C. U. S. Filed 5th December, 1870.

# BRIEF OF PLAINTIFF IN ERROR.

## SUPREME COURT OF THE UNITED STATES.

No. 323.

SAMUEL DOLTON, PLAINTIFF IN ERROR,

vs.

AARON CAIN AND HENRY COOMS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

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## BRIEF OF PLAINTIFF IN ERROR.

### STATEMENT OF THE CASE.

This was an action of ejectment, brought by plaintiff in error against the defendant in error. The plaintiff in error in the Court below showed title in himself directly from the United States to the *locus in quo*, being the S. W. $\frac{1}{4}$ of Sec. No. ten (10) in Township No. two (2) North, of Range seven (7) East of the fourth Principal Meridian, in the county of Adams in the State of Illinois. The last conveyances to him were from the heirs-at-law of Rene M. F. Jacquemart, dated June 27th, 1864, and from the heirs of Augustus R. Thiriat, dated June 17th, 1864.

make and execute or deliver any deed after the price or value thereof shall have been received by the original attorneys or by one of them, and that the parties contracting for the purchase of said lands shall only be legally discharged and released therefrom by the receipt and discharge of the attorneys by these presents constituted, or one of them, declaring that Mr. and Mad'me Jacquemart act the constituents, ratify from this present moment all that the said attorneys, or either of them, or their substitutes, shall have done or cause to be done by virtue of these presents.

This instrument was made and executed at the establishment Thermal D'Engluen les Bains, (Seine et Oui,) where Mr. and Mad'me St. Rene Jacquemart are at the present time, on the seventh day of August, in the year one thousand eight hundred and forty-seven. And after the same had been read, Mr. and Madame Saint Rene Jacquemart affixed their signatures thereto, together with the notaries. Two words erased as null and void in the body of this instrument.

A. L. D. D.

A. L. DOULCET D'EGLIGNY.

*Marechal.*

R. JACQUEMART,

*Chandru.*

Examined for the purpose of proving legal the signatures of Messrs. Marechal and Chandru, notaries at Paris by us, judges, the president of the civil tribunal of the Seine being presented.

Paris, August 10th, 1847.

CH. BOURGAIN. [L. S.]

Examined for the purpose proving legal the signatures of Mr. Bourgain, a judge of the civil tribunal of Paris. Paris, August 11th, 1847. By delegation, the chief of the bureau of the office of the ministers of justice.

LANDY. [L. S.]

Recorded at Paris, in the 6th Bureau, on the 10th day of August, one thousand eight hundred and forty-seven, in Vol. 202,

fol. 162.—Vol. 2.—Received four francs and forty centimes for a tenth. $4 50.

BAUS.

KINGDOM OF FRANCE,
*City of Paris:*
CONSULATE OF THE UNITED STATES OF AMERICA, PARIS.

The within signature "Landy," duly authenticated at this consulate. In testimony whereof I have hereunto set my hand and seal of office this 12th day of August, in the year of our Lord, 1847.

ROBERT WALSH, U. S. C. [SEAL.]

KINGDOM OF FRANCE,
*City of Paris:*
CONSULATE OF THE UNITED STATES OF AMERICA.

I, the undersigned, consul of the United States of America for the city of Paris, do hereby certify that, on this sixteenth day of August, A. D. 1847, Rene Marie Ferdinand Jacquemart, and Adele Louise Doulcet D'Egligny his wife, known to me to be the identical individuals named in, and who executed the within letter of attorney personally appeared before me, and severally acknowledged the said letter of attorney by them subscribed, to be their free act and deed, for the purpose therein mentioned; and the said Adele Louise Doulcet D'Egligny, being of full age, and by me duly examined separate and apart from her said husband, and the contents of said letter of attorney being fully made known to her, declared she did voluntarily sign, seal, and execute the same without any coercion or compulsion of her said husband.

In testimony whereof I have hereuuto set my hand and seal of office this said sixteenth day of August, in the year of our Lord, 1847.

[SEAL.] ROBERT WALSH,
*U. S. Consul.*

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

James Monagh, of said city, counselor at law, being duly

sworn, deposes and says that he understands the French and English language; that the foregoing document is a correct translation from the French language in the English language of a paper which purports to be a duly authenticated letter of attorney, and of the certificates thereto attached. And this deponent further says, that the copy of the United States consul's certificate at foot of said document, is an exact transcript of an original certificate annexed to said letter of attorney.

JAMES MONAGH.

Sworn before me this 20th day of September, 1847.

STATE OF NEW YORK,
*City and County of New York, ss:*

On the day of the date hereof, before me, the subscriber, a commissioner in and for the State of New York, appointed by the governor of the State of Illinois, with full power and authority to take the acknowledgment and proof of deeds and other instruments of writing, under seal, to be used or recorded in the said State of Illinois, duly commissioned and sworn, residing in the city of New York, personally came and appeared James Monagh, Esq., the above named deponent, who being by me duly sworn according to law, did depose to the truth of the above affidavit.

In testimony whereof I have subscribed my name and affixed my seal of office at the city of New York, this twentieth day of September, 1847.

JOSEPH C. LAWRENCE,
*Commissioner, &c., for the State of Illinois.*

The defendants then read in evidence, without objection, except as legal effect, letter of substitution by Tillon & Cutting, to Washington Cockle, as follows:

To all whom these presents shall come, we, Francis R. Tillon and Walter L. Cutting, send greeting:

Whereas Rene Marie Ferdinand Jacquemart and Madame

Adele Louise Doulcet D'Egligny, his wife, by their letter of attorney in the French language, a true, full, and correct translation whereof into the English language is hereunto annexed, did constitute us his attorneys, for the purposes and with the powers in the same letter of attorney at large contained. Now, know ye, that we, the said Francis R. Tillon and Walter L. Cutting, by virtue hereof and the power of substitution in said letter of attorney appearing, have substituted and deputed, and do substitute and depute, Washington Cockle, of Peoria, in the State of Illinois, counsellor at law, to be the lawful and sufficient attorney of the said Rene Marie Ferdinand Jacquemart and Adele Louise Doulcet D'Egligny, his wife, with all and every power and authority of acting in the same stead and to the use of the said Rene Marie Ferdinand Jacquemart and Adele Louise Doulcet D'Egligny, granted to us by the said letter of attorney, which we can lawfully exercise and delegate, hereby ratifying and confirming whatsoever the said Washington Cockle shall lawfully do in the name of the said Rene Marie Ferdinand Jacquemart and Adele Louise Doulcet D'Egligny, his wife, or in our names as attorneys to the said Rene Marie Ferdinand Jacquemart and Adele Louise Doulcet D'Egligny, his wfie, to the use of the said Rene Marie Ferdinand Jacquemart and Adele Louise Doulcet D'Egligny, his wife, by virtue of these presents and the power substitution in said letter of attorney contained.

In witness whereof we have hereunto set our hands and seals the twentieth day of September, 1847.

F. R. TILLON. [SEAL.]
W. L. CUTTING. [SEAL.]

Sealed and delivered in presence of—
JAMES MONAGH,
JOSEPH C. LAWRENCE.

STATE OF NEW YORK,

*City and County of New York, ss :*

Be it remembered that, on the twentieth day of September, A. D. 1847, before me, the subscriber, a commissioner in and for the State of New York, appointed by the governor of the State of Illinois, with full power and authority to take the acknowledgment and proof of deeds and other instruments of writing, under seal, to be used or recorded in said State of Illinois, and to administer oaths, duly commissioned and sworn, residing in the city of New York, personally came and appeared Francis R. Tillon and Walter L. Cutting, who are personally known to me to be the individuals described in and who executed the within letter of substitution, and acknowledged to me that they had executed the same.

In testimony whereof I have subscribed my name and affixed my seal of office the day and year above written.

[L. S.] JOSEPH C. LAWRENCE,

*Commissioner of Deeds for the State of Illinois*, 82 *Wall St*

The defendant then read in evidence a bond from Jean Ferdinand Jacquemart, by Washington Cockle, to defendant in error, which is as follows :

Know all men by these presents that I, Jean Ferdinand Jacquemart, of France, by Washington Cockle, of the county of Peoria, in the State of Illinois, my attorney, am held and firmly bound unto Aaron Cain of the county of Adams in the State of Illinois, in the penal sum of six hundred dollars, lawful money of the United States, to the payment of which well and truly to be made, I bind myself, my heirs, executors and administrators firmly by these presents, sealed with my seal, dated at Peoria this 29th day of July, 1848.

The condition of the above obligation is such that whereas the said Aaron Cain hath purchased from the said Jean Ferdinand Jacquemard the following described tract of land situated

in Adams county aforesaid, viz: the southwest quarter of section number ten, in township number two north, of range number seven west of the fourth meridian (No. 10, 2 N., 7 W.) for the sum of three hundred dollars, and made payment of one hundred dollars of the principal money and given his three notes of hand for the residue payable as follows, to wit: one for sixty-eight dollars in one year from 1st of November next, one for sixty-six dollars in two years from that date, and one other for sixty-six dollars in three years from same time, all bearing interest from date hereof and payable at Peoria, and has agreed to pay all taxes hereafter to become payable on the same land. Now, provided the said Aaron Cain shall pay or cause to be paid the said sums of money on the days specified and appointed for the payment thereof and said taxes, and the said Jean Ferdinand Jacquemart shall, upon full payment of the purchase money aforesaid, make, execute and deliver to the said Aaron Cain, or his assignee, a warranty deed of conveyance for said premises in fee simple with the usual covenants, then this obligation to be void; otherwise to remain in full force and virtue. It is however understood that the said Aaron Cain is, at his own costs, to purchase or otherwise obtain possession of the improvements on the premises on the above described lands.

JEAN FERDINAND JACQUEMART,
[SEAL.] By WASHINGTON COCKLE,
*His Attorney through substitution per Tillon and Cutting.*

The defendant introduced evidence tending to show that he had been in possession of the premises in controversy, by himself or tenants, for more than seven years, and had paid all the taxes assessed upon said premises for that time, and that he actually resided on said land from the spring of 1849 to the spring of 1862. This suit was commenced March 28, 1865.

The questions presented in this record are, first, Does the bond for a deed from Jean Jaques Jacquemart, by Washington

Cockle, above recited, constitute such "Color of title made in good faith," under Sec. 8, Chap. 24, Revised Statutes of 1845, which is as follows: "Every person in the actual possession of lands or tenements under claim and color of title made in good faith, and who shall, for seven successive years, continue in such possession, and shall also, during said time, pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements to the extent and according to the purport of his or her paper title. All persons holding under such possession by purchase, devise, or deccent, before said seven years shall have expired, and who shall continue such possession, and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section."

2. Is that bond a connected title, either in law or equity, deducible of record from the state of Illinois or the United States, so as to bring this case within the provisions of Section 8, Chapter 66 of the Revised Statutes of Illinois, which is as follows: "No person who has or may have any right of entry into any lands, tenements, or hereditaments, of which any person may be possessed by actual residence thereon, having a connected title in law or equity, deducible of record, from this State or the United States, or from any public officer or other person authorized by the laws of this State to sell such lands for non-payment of taxes, or from any marshal, or other person authorized to sell such land on execution, or under any order, judgment, or decree of any court of record, shall make any entry thereon, except within seven years from the time of such possession being taken. The possessor shall acquire such title after the time of taking such possession. The limitation shall begin to run from the time of acquiring title."

Or of Section 11, Chap. 66 of the Revised Statutes of Illinois, which is as follow: "Every real, possessory, ancestral or mixed action, or writ of right, brought for the recovery of any lands, tenements, or hereditaments of which any person may be possessed by actual residence thereon, having a connected

title in law or equity, deducible of record from this State or the United States, or from any public officer or other person authorized by the laws of this state to sell such land for the non-payment of taxes, or from any sheriff, marshal, or other person authorized to sell such land on execution, or under any order, judgment, or decree of any court of record, shall be brought within seven years next after possession being taken as aforesaid; but when the possessor shall acquire such title, after taking such possession, the limitation shall begin to run from the time of acquiring title."

I suppose, if any principle of law can be considered as settled in the state of Illinois by judicial determination, it is settled that a bond for a deed does not constitute color of title under Sec. 8 of Chap. 66, above quoted.

This is a principle affecting the title to real estate to such an extent that if I can show that a rule has been settled by the Supreme Court of this state, by repeated and concurrent decisions, and that no conflicting authority can be found in the decisions of that court, I shall have no need to discuss the question whether this Court will follow the rule so established, but may assume that fact.

What is color of title made in good faith under that section?

In *Woodard* v. *Blanchard*, 16 Ill. R. 430, it was said "that color of title was a question of law and good faith—a question of fact—and that color of title must be a paper title, and, whether originating in a wrong or a right, made no difference; there must be some written evidence of title under the statute, and, as the Court say: 'An action or motion of the mind;' it must be acquired honestly; it must be such a title as a reasonably intelligent man would have confidence in."

In *Irving* v. *Brownell*, 15 Ill. 412, the Court said: "By the words, claim and color of title made in good faith, we must un-

derstand such a title as, tested by itself, would appear to be good —that is, a *prima facie* title."

In the case of *Dunlap* v. *Dongherty* et al., 20 Ill. 404, the Court said: "The defendant paid taxes for two or three years *under his contract for a conveyance*, and without including these payments by him, payment of the taxes for seven successive years was not shown, and the defendant not having shown color of title and payment of taxes running together for the period limited, has failed to bring himself within the provision of section 9 of the statute." The provisions of section 8 and section 9 in relation to "color of title" are identical. This case is referred to and approved in the case of *Dickenson* v. *Breeden*, 30 Ill. 320, where the Court says: "In *Dunlap* v. *Dougherty*, 20 Ill. 404, we said that an executory contract for a conveyance was not color of title."

In *Brill* v. *Watt*, 23 Ill. 507, the Court held that a certificate of purchase of land at a tax sale was not "color of title." "Had the act declared that the holder of color of title, paying taxes as required by this law should, be adjudged to be the holder of the legal title to the extent and according to the purport of his color of title, agreement for a title or claim of title, then the act might be construed to embrace every kind of title or claim which has been held to be color under the twenty years limitation laws, but that construction is excluded by the terms of the act itself. What is the purport of a certificate of purchase of land at a tax sale or of a title based *on an agreement for the purchase of land? They do not purport to pass any title*, either in fee, remainder, reversion or for term of years, or any other estate. They only purport to give the holder a right to have the title agreed to be sold at the expiration of the time agreed upon and upon the performance of the conditions and covenants they may contain. To confirm such a title according to its purport, would only be to make the instrument valid by curing defects which it might contain. This could not have been the intention of the Legislature in adopting this en-

actment. It will then become necessary to ascertain what is the meaning of the term color. Stephens, in his Treatise on Pleadings, 241, 2d Lond. Ed., defines it to mean 'an apparent or *prima facie* right,' and refers to *Hutton* v. *Morse*, 3 Salk. 273, which fully supports the definition. Chitty's Pl., Vol. 1, p. 557, and 3 Blackstone's Com. 309, are to the same effect, and this is the definition given by all law lexicographers. The Legislature having excluded the broadest and most comprehensive sense of the term, must have intended to use it in the sense in which it is defined by these authorities when they confine it to paper or written color of title. *The deed or other instrument relied upon must apparently transfer title to the holder.* Not that the title should purport, when traced back to its source, to be an apparently legal and valid title, *but the instrument under which the occupant holds and upon which he relies must itself profess to convey a title to the grantee.*"

In *Dickenson* v. *Breeden*, 30 Ill. 325, the Court says: "That the substance of the decisions is that any deed *purporting on its face to convey title*, no matter on what it may be founded, is color of title."

In the case of *Shackelford* v. *Bailey*, 35 Ill., the Court say: "And the color must arise out of some conveyance purporting to convey title to a particular tract of land," approving the doctrine of the case of *Dickenson* v. *Breeden*, above cited.

In the case of *Brooks* v. *Bruyn*, 35 Ill. 394, the same doctrine is maintained; so also in the case of *Blanchard* v. *Pratt*, 37 Ill. 245.

In *Hinkley* v. *Green*, 52 Ill. 227, the Court says: "It has been held by numerous decisions of this Court that a deed *which on its face purports to convey title*, constitutes claim and color of title."

From these cases, the doctrine of which is entirely uncontroverted in this state, it would seem to be settled that a bond for

a deed which does not purport on its face to convey any present title, does not constitute color of title under the section above quoted.

## II.

The next question is, Did the defendant show an actual residence on these lands, having a connected title in law or equity deducible of record? It is obvious that he had no title at law whatever; the most that can be said or claimed is, that he had an agreement for a title.

The only remaining question, therefore, is, Had he a title in equity deducible of record, so as to bring the case within the provisions of either the eighth or eleventh sections of the act of 1866, above quoted?

There are several objections, which I shall present in their order, to the sufficiency of the papers relied upon by the defendant before the execution of the bond given Washington Cockle, as attorney to the defendant; but I wish first to show, as I believe I can, that if all the papers offered in the case by the defendat are entirely free from any objection, still they do not show a connected title in equity in the defendant. There may be an equitable *interest* in land, which is much less than a *title* in equity. I suppose that a "title in equity" may be defined to be such an interest in land as will enable the person holding such interest to acquire the legal title thereto by appropriate proceedings for that purpose in a Court of Equity. Thus, where one person holds the naked legal title to a tract of land in trust for another, nothing remaining to be done by the *cestui que trust* to entitle him to receive the legal title to said land, he has a title in equity. But such right in the *cestui que trust* must be perfect at the time, not an inchoate right. If one man purchase a tract of land from another, the purchase money to be paid at a future time, no trust arises in

favor of the purchaser until the purchase money is fully paid, nor has the purchaser a title in equity to the land until the whole purchase money is paid, and he is entitled to come into a Court of Equity and have the legal title vested in him by a decree of that Court. The principle affirmed in all the cases cited from the decisions of the Supreme Court of Illinois, that a bond for a deed, or a right to have a deed upon a future contingency, is not color of title, because it does not purport to convey a present title, is applicable as well and to the same extent to a title in equity as to a title at law, and the precise question has been directly settled in so many cases in the Supreme Court of this State as to have become a fixed and settled rule of property. The same incidents which would prevent a legal seizer of a legal estate will prevent an equitable seizer of an equitable estate.

1 Washburn on Real Property, pp. 174, 181.
*Thompson* v. *Thompson*, 1 Jones N. C. Law, 430.

Equitable estates shall be subject to the widow's dower.
Gross' Statutes of Illinois, p. 231.

The words "equitable estates" have always been held and treated as an equivalent to the the words "title in equity," in the judicial decisions.

In the case of *Steele* v. *Magie*, 48 Ill. 397, the Court says: "It is evident from the statement that *Steele never had in his own right either the legal or the equitable title to these premises.* He was never in a position to claim the legal title from the State. He had merely an incomplete equity which might or might not ripen into a title. This was not such an equitable estate of inheritance as is contemplated by our statute as a basis of dower."

In the case of *Stone* v. *Steele*, 45 Ill. 328, the Court says: "The husband must hold such an executed equitable estate as to entitle him to be invested with the legal title to vest the wife with a right of dower in the premises. In case of a

purchase, and time is given for the payment of all or any portion of the purchase money, and a contract for a conveyance is entered into, that does not vest the husband with such an estate as confers the right of dower upon the wife, unless the husband pays the money and entitles himself to a conveyance. If the husband has not during his life been entitled to a conveyance, the wife will not be entitled to dower on his death, unless the purchase money shall subsequently be paid for the benefit of the heirs."

In the case of *Nicoll* v. *Ogden*, 29 Ill. 377, the Court says: "A few plain propositions may be stated about which there is no dispute. In order to entitle the widow to dower in the property, the husband must at some time during coverture have been seized of an equitable estate of inheritance in the property; *that is, an equitable title to this property should have presently existed in him.*"

In that case a distinction is taken between executory or executed trusts. An executed trust being where one holds a "legal title in trust for the benefit of another, in whom is already vested the equitable title, with a right to be clothed with the legal title. But where the beneficiary is not yet clothed with such an equitable title, but has a mere right to have some act done which will vest in him such equitable title, there the trust is called executory, because of the necessity of the performance of this intermediate act." In relation to this latter kind of trusts the Court says: "They had no *vested equitable title to the land*, but they had a mere right to have something done which would give them an equitable title; or rather, they had a right which, upon the performance of an act by themselves, would ripen into an equitable title."

In order to have a "title in equity" to the land in controversy, it is evident that the defendant must have had a complete and perfect right to demand the legal title of those who held it, whether they were the heirs of Thiriat or the heirs of

Jacquemart. If any act remained to be done by him before he would be entitled to demand that the legal title be vested in him, he had not a title in equity, which could be made available in defence of this suit. Suppose the bond given by Cockle as attorney for Jean Ferdinand Jacquemart was perfect and bound Jacquemart to convey the legal title to Cain, the defendant, upon his compliance with the terms of the bond, did anything remain to be done by Cain before he could demand that the legal title be vested in him?

By the terms of this bond he was required to pay $300, $100 of which was paid down and three notes given for the remainder, to wit: One for $68, payable in one year from 1st November 1848; one for $66, payable in two years from that date; and the other for $66, in three years from same date, all bearing interest. Were these notes paid? Cain testifies as follows: That he paid $100 of the purchase money to Cockle at the time he purchased the land, and also paid all the deferred payments to said Cockle as the same became due, except the last; that at or very soon after the maturity of the last deferred payment, he offered to pay the same to Cockle, but the latter refused to receive the same, for reason that he had heard rumors that Jacquemart was dead; that he had always been ready and willing to pay the same, but did not know who was entitled to receive the same. It appears from the record that Jacquemart died in 1848, whether before or after the bond given by Cockle on the 29th day of July A. D. 1848, does not appear; but certainly before either of the deferred payments were made by Cain. The death of Jacquemart was a revocation of the power of attorney.

*Michigan Ins. Co.* v. *Leavenworth*, 30 Vt. 11.
*Scruggs* v. *Driver*, 31 Ala. 274.
*Saltmarsh* v. *Smith*, 32 Ala. 404.
*Cravers* v. *Crane*, 15 Cal. 12.
*Hunt* v. *Rousmanier*, 8 Wheat. 174.

And the subsequent payments could not have been properly made to Tillon & Cutting. They never could have been

properly made to Cockle, except as he was the agent of Cain to forward the money to Tillon & Cutting, because, by the terms of power of attorney given Rene Marie Ferdinand Jacquemart and Adele Louise Doulcet d'Egligny, his wife, to Tillon & Cutting, although said Tillon & Cutting had the power of substitution, yet it was provided that the substitute attorneys should only have power to make, execute, or deliver any deed after the price or value thereof should have been received by the original attorneys, or by one of them, and that the parties contracting for the purchase of said lands shall be only legally discharged and released therefrom by the receipt and discharge of the attorneys by these presents constituted. This bond was the muniment of title under which Cain claimed he was charged with full notice of its contents.

Washburn's Law of Real Property, Vol. 2, p. 596.

A payment to Cockle, then, was good only when he had transmitted the money to Tillon & Cutting. Cain was bound to see that the money was so transmitted before he could be released from the payment in transmitting the money. Cockle was his agent, and not the agent of Jacquemart. Cockle testifies that with the two payments actually made to him by Cain, he paid taxes for Jacquemart, and reported the payment to Tillon & Cutting, by whom his acts were approved. This would, perhaps, have made these payments good but for the fact that the death of Jacquemart had ended the power of Tillon & Cutting under the power of attorney, but it could not affect the last payment, *which was never made.* Cain says he offered to pay the last payment to Mr. Cockle; but the letter of attorney, under which Cain claims, says explicitly that such payment, if made, should not discharge him. How, then, could a mere offer (not a tender) have that effect? An offer, or even a tender of payment to Cockle could only be effectual in case Cockle was authorized by Jacquemart to receive the money for him. On the contrary, the power of attorney expressly limited the authority

to receive the money to Messrs. Tillon & Cutting, and denied to Mr. Cockle that right, and expressly provides that Cain should not be released by payment to Cockle, but only by payment to Tillon & Cutting. He never made, or offered to make, the payment in the only way in which it would avail to release and discharge him from his covenants to pay.

The true test is this, could he, without doing anything more, without making any other tender, or any other payment, compel the heirs of Jacquemart to convey to him the title which they had, if any? He certainly could not. He must have made a proper tender of this last payment to the parties entitled to receive the same, before he could compel a deed from them. This seems decisive of the question. To use the language of the Supreme Court of the State of Illinois in the case of *Nicoll* v. *Ogden* et al., 29th Ill. 285 :

"He had no vested equitable title to the land ; but he had a mere right to have something done which would give him an equitable title; or rather, he had a right which, upon the performance of an act by himself, would ripen into an equitable title. This is decisive of this case, if my conclusions upon this point are correct." Same point is settled in the case of *League* v. *Atchison*, 6 Wallace, 112.

## III.

But there are other reasons why no connected title in law or equity was shown by the defendant. He derives his title, such as it is, from Jacquemart. Now, had Jacquemart any connected title in law or equity to this land? All the claim, or pretence of claim, of Jacquemart to the land arises from these words in the deed of James McGuire to Augustus R. Thiriat, which is above quoted: "This indenture made between James McGuire, of the first part, and Augustus R.

Thiriat, in trust for Rene M. F. Jacquemart, of the second part."

The *habendum* clause of the deed is as follows: "To have and to hold the said quarter-section of land with the appurtenances thereof unto the said party of the second part, and to his heirs and assignees forever." The covenants in the deed were to said party of the second part and his heirs and assigns forever. What is the nature of the trust created, and to what extent? Is it such a trust as, executed at once by the statute of uses, vested the entire title of the land in Rene M. F. Jacquemart and his heirs, in fee simple?

According to the general principles of construction, the Court will always strive to give effect to every part of an instrument. By the construction above indicated, that part of the deed, the *habendum* clause, "To have and to hold the said quarter section of land with the appurtenances thereof unto the said party of the second part his heirs and assigns forever," becomes wholly inoperative. It is evident that this was not a mere naked trust in Thiriat for Jacquemart and his heirs. There was some interest in the land conveyed to Thiriat which would pass to his assigns. There is a broad distinction between a trust created by will or deed of gift, and a trust created by bargain and sale. In the one case no consideration passes to the testator from the trustee, or from the trustee to the donor; in the other a consideration passes either from the trustee or *cestui que trust* to the grantor, and in determining the force and effect of the words used, and the character of the trust conveyed, great weight must be given to the fact, whether the consideration moved from the trustee or from the *cestui que trust*, owing to the fact, I suppose, that deeds of bargain and sale, when they are intended to create a trust, are generally expressed in such manner as to leave no question that a trust is intended. Very few cases can be found in the books which decide the precise question

arising upon the face of the deed, yet there are some which seem exactly in point.

In the case of *Eldridge* v. *See Yup*, 17 California R. 44, it was held that "To raise a trust in a deed of bargain and sale, there must be, 1st, a *cestui que trust;* and, 2d, an interest in the property conveyed, or some right or profit growing out of it, and the deed must show these things." In this case a deed of bargain and sale to one A contained the words "For the use of a Chinese church," &c., under his direction and in conformity to the rules of the See Yup Co.

In the case of *Brown* v. *Combs*, 5 Dutch. N. J. 36, the Court said: "A deed to J. G. B., trustee of the L. & D. Railroad Company, with *habendum* and covenants to heirs, 'his heirs and assigns,' was held to convey the estate to him absolutely and free from any trust in favor of the Company."

I insist that this deed from McGuire to Thiriat (which is a deed of bargain and sale, the consideration of which passed from Thiriat according to recitals in the deed, which is the only evidence on the subject,) created no trust in favor of Jacquemart, because no trust was sufficiently stated; and, second, if any trust was created, it was not such a trust as vested an estate of inheritance in fee simple in Jacquemart and his heirs.

## IV.

But the power of attorney from Jacquemart and his wife did not authorize Messrs. Tillon and Cutting, or any attorney substituted by them, to sell this land.

The power of attorney authorized the attorneys to sell "the entire or only a part of all sorts, pieces, parcels or portions of land situated in the State of Illinois, in the United States of

America, which *Mr. and Madame* Jacquemart at present own, or may hereafter become possessed of, and in which State *the said constituants* now have or may hereafter have interests of any kind so ever to be protected."

The power of attorney was a joint one, the lands authorized to be sold were the lands of Mr. and Madame Jacquemart, or, in other words, the lands jointly owned by them. There is no other description of the lands. The power of attorney did not authorize the sale of lands held individually and solely by either Mr. or Madame Jacquemart. The deed from McGuire to Thiriat, the only muniment of title under which Jacquemart claims any interest in the land, certainly vests no legal estate of any kind in Madame Jacquemart, and this tract of land therefore was not one described and authorized to be sold by the provisions of the power of attorney.

The authority given by the power of attorney is not to be executed beyond the plain and usual meaning of the words.

*Gee* v. *Bolton*, 17 Wis. 604.
*McGregor* v. *McGregor*, 14 Iowa, 326.
*Rice* v. *Tavernier*, 8 Minn. 248.

The case of *Dodge* v. *Hopkins*, 14 Wis. 630, is precisely like this, and exactly in point. It was there held that "a joint power of attorney from husband and wife for the sale of all their property, in which the words 'we, us and our' were consistently and exclusively used, was held, in the absence of extrinsic proof of the non-existence of joint property, not to authorize a sale of property belonging to the husband alone."

## V.

Cain had no connected title deducible of record, either in law or equity, to the premises in question. The title must be connected; it must be deducible of record. Whatever may be said about the title of Jacquemart, it is clear that the deed from Thiriat and the power of attorney to Tillon and Cutting do not connect with the bond given by Cockle. Rene Marie Ferdinand Jacquemart and Jean Ferdinand Jacquemart are not the same. No title through these muniments of title only could be properly styled a connected title, deducible of record. Cain could not deduce his title from the United States down to himself by the record, showing a connected title.

*League* v. *Atchison*, 6 Wallace, 112.

BURTON C. COOK,
*Attorney for Plaintiff in Error.*

# Argument for Plaintiff in Error.

## SUPREME COURT OF THE UNITED STATES.

JEREMIAH COLLINS AND JOSHUA COLLINS,

vs.

LAURISON RIGGS.

No._____

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED_____ 187

# SUPREME COURT OF THE UNITED STATES.

JEREMIAH COLLINS AND JOSHUA COLLINS,

VS.

LAURASON RIGGS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

## ARGUMENT FOR PLAINTIFF IN ERROR.

### STATEMENT OF CASE.

IN 1846 J. B. F. Russell purchased of the United States a large number of tracts of land situate in Cook, Will and La Salle counties and State of Illinois.

In April 1837 Russell conveyed a part of these lands in each of the said counties of Cook, Will and La Salle, including the land in controversy, to Josiah S. Breese, and this deed was recorded in Cook county and in Will county.

December 21st, 1847, Russell executed a mortgage of all the lands entered by him, including the lands in controversy, to the United States, which mortgage was recorded in Grundy county, where the lands in controversy are situated, prior to the record

of the deed from Russell to Breese, in that county, but Breese's deed had been recorded in Cook and Will counties prior to the execution of the mortgage.

The mortgage from Russell to the United States was foreclosed in the Court below in 1840—the land sold to United States recorded March 15th, 1844.

Deed to Corcoran from Solicitor of the Treasury, July 21, 1848. Deed from Corcoran to defendant in error December 28, 1866.

*Question* 1*st.* Was Breese a party to the decree of foreclosure? The evidence upon this point is as follows:

1. The decree recites: "This day came the said defendants and it appearing to the Court that they had been served with process," &c. This recital is the only evidence of the service of process on Breese.

On the contrary, it appears from the full record of the case that only one summons was ever issued; that summons is set out in *hac verba* in the full record, and that summons was produced, and the Marshal's return thereon shows that Breese was *not* served. The fee book and bill of costs show that only one summons was ever issued.

The well settled rule is, that "when the jurisdiction of a court is once admitted, then, in all collateral proceedings, the finding of the Court is conclusive; but upon the question of the right of the Court to act upon the persons or rights of parties, the finding of the Court is not conclusive. If the requisite notice has not been given to or process been served upon a party, then the Court has no more authority to adjudicate upon his rights than a stranger or a private individual."

*Goudy* v. *Hall*, 20 Ill. 109.

In this case the Court says: "Take the case where the law requires six weeks' notice, and the record itself shows that but three weeks' notice was given; or where a process has been returned not served and the Court should find that the requisite notice was given or that the process was duly served, it would show that this finding was void for want of jurisdiction to find anything in the case." The case at bar is precisely the case supposed by the Court, and it would be absurd to say that the recital in the decree shows that Breese was served with process, and was conclusive of that fact when the very process itself which the decree recites was served upon Breese, shows that it was *not* served.

This principle is also decided in the case of *Harris* v. *Hardeman*, 14 Howard, 334, where, in an unanswerable opinion fortified by citations of authorities from nearly all the State Courts, the Supreme Court of the United States say: "But it is contended that if other matters may be pleaded by the defendant he is estopped from asserting anything against the allegation contained in the record. It imports perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the Court? Solely to show that its proceedings are void, and, therefore, the supposed record is, in truth, no record. If the defendant had not proper notice of, and did not appear to, the original action, all the State Courts, with one exception, agree in opinion that the paper introduced as to him is no record, but if he cannot show, even against the pretended record, the fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense by a process of reasoning that, to my mind, is little less than sophistry."

See also *Rivard* v *Gardner*, 39 Ill. 129.

In *Butterfield* v. *Johnson*, 46 Ill. 68, the Court holds that the return is part of the record and is conclusive on the parties.

In this case a full record of every paper was required by law to be kept, and was kept, and it is certain that but one summons was issued in the case.

Breese not having been served with process, the decree has no more effect as to him than if he had not been made a party to the bill.

*Goudy* v. *Hall*, 30 Ill. 109.
*Rivard* v. *Gardner*, 29 Ill. 128.
*Harris* v. *Hardeman*, 14 How. 334.

As between Russell and Breese, Breese was the owner of the equity of redemption, and a sale on a mortgage without making the owner of the equity of redemption a party is void as to him.

*Ohling* v. *Luitjens*, 32 Ill. 23.

In that case the Court say: "The complainant in this bill, the defendant in error here, cannot then be affected by a suit and decree to which he was not a party. He is still the owner of the equity of redemption, and entitled, by his position, to claim all the advantages belonging to it. The decree, as to him, is a mere nullity, as any other judgment would be to which he was not a party, and he therefore lost nothing by the decree. The Court pronouncing the decree of foreclosure and sale, had no jurisdiction of this defendant in error in that suit, and his rights remain uneffected by it."

The same doctrine is held in—

*Watson* v. *Spence*, 20 Wend. 264.
*Reed* v. *Marble*, 10 Paige Ch. 410.

The deed from Russell to Breese was recorded in Cook and Will counties before the mortgage from Russell to the United States was made, and there can be no question that, if the deed had been recorded in Grundy county before the decree was rendered in the foreclosure suit, that decree and the sale under

it would not in any way have affected Breese's right as the owner of the equity of redemption.

The case of *Ohling* v. *Luitjens*, 32 Ill. 23, is decisive upon this point.

Now, if it can be shown that, at the time when the bill to foreclose the mortgage was filed, the agents of the United States had notice of the existence of the deed to Breese, then the same result is reached as if the deed had been recorded before the filing of the bill, and this case is brought directly within the case of *Ohling* v. *Luitjens*, above cited.

The United States officers did know at the time the bill was filed that Breese had some claim of title to this land, because they aver in the bill that he had such claim. The land mortgaged to the United States was situate in Cook, Will and La Salle counties. The land sold to Breese was a part of the same land, and it was impossible that the officers having charge of the matter should have examined the title to either of the tracts situated in Cook or Will counties without seeing this deed from Russell to Breese, because all the lands deeded by Russell to Breese were conveyed in one deed, and that was recorded in Cook and Will counties before the mortgage was made. Any one looking up the title to any one of these tracts in Cook or Will counties must have seen this deed conveying the land in controversy, and they did see it during the legal proceedings to foreclose the mortgage. Mr. Butterfield, U. S. District Attorney, writes to the Treasury Department that he has an abstract of the lands, and that it is very long, and he does not send it. Now, when was that abstract made? The inference is irresistible that it was before the bill was filed; hence they knew that Breese claimed title to these lands, and so made him a party to the bill. It is true that at the time the bill was filed the United States knew that Breese had some claim to the land. It is not shown or pretended that he was a judgment creditor of Russell's. If they knew he had a claim under the circum-

stances they must have known his real claim. But, be this as it may, the United States knew he had some claim to the lands. Having that knowledge they could not bar that claim without making Breese a party to the bill and serving him with process; and all persons who purchase the land under that decree, or whose title is derived through the decree, are advised by the statement of the bill that Breese had a claim of title, which was notice to each one of Breese's deed, for it was sufficient to put them upon inquiry.

If this is so, the case stands precisely as it would if Breese's deed had been recorded in La Salle county after the recording of the mortgage to the United States, and before the bill was filed to foreclose the mortgage; and under this state of facts the plaintiff in the Court below cannot recover. I shall therefore try to show by authority that I am right in saying that, when the bill was filed, the officers of the United States had notice of Breese's claim sufficient to put them upon inquiry; and that each subsequent purchaser had the same notice by the statement of the bill.

In Washburne's Law of Real Property, vol. 2, p. 596, after the citation of all the authorities, the rule is stated thus:

"The rule is that the law imputes to the purchaser a knowledge of all facts relating to the same land, appearing at the time of his purchase upon the muniments of title which it was necessary for him to inspect in order to ascertain the sufficiency of such title. And, if an ordinarily diligent search would bring to the enquirer a knowledge of a prior incumbrance or alienation, he is presumed to know of them."

"Whatever puts a party upon enquiry amounts in judgment of law to notice; provided the enquiry oecomes a duty and would lead to a knowledge of the requisite facts by the exercise of ordinary diligence and understanding."

4 Kent's Com. 172.

"Enquiry is always a duty with a purchaser."

*Hill* v. *Epley*, 31 Penn. St. p. 830.

"Notice to a purchaser that another claims the land is sufficient to charge him with notice of the title. All that is necessary is to give a purchaser such notice as is sufficient to put him on enquiry leading to the whole truth."

*Barnes* v. *M'Clintock*, 3 Penn. R. 67.

"Where a party has a sufficient notice to put him on enquiry it is equivalent to actual notice."

*Pitney* v. *Leonard*, 4 Paige's Ch. R. 461.
*Williamson* v. *Bruce*, 15 N. Y. R. 361.
*Tuttle* v. *Jackson*, 6 Wend. 213.
*Grinstone* v. *Carter*, 3 Paige Ch. R. 421.
*McGehen* v. *Geedral*, 20 Ala. 98.
*Larmont* v. *Stenscn*, 5 Miss. 443.
*Cook* v. *Yaryee*, 13 Texas, 438.

When A heard B say that he had an unrecorded deed for certain land, it is sufficient to charge A, who subsequently purchased the lands, with actual notice of the title of B.

*Manse* v. *McLean*, 13 Missouri, 298.

Much more, if the fact is distinctly announced to him in one of his muniments of title.

The same doctrine is fully held in the Supreme Court of Illinois and in this Court.

*Doyle* v. *Leas*, 4 Scam. 249–50.
*Rupert* v. *Mark*, 15 Ill. 542.
*Scott* v. *Moore*, 3 Scam. 123.
*Ogden* et al. v. *Hoven* et al., 24 Ill. 59.
*Morrison* v. *Kelly*, 22 Ill. 624.

The rule stated in the last case is: "It is the settled doctrine of this Court, and it is believed to be in Great Britain and the

various Courts of the Union, that under the registry laws a notice of a prior conveyance is as effectual as the registry of the deed. The object of recording the deed being to give notice to the world of the purchaser's claim of title, when that end is attained, whether by recording, actual notice, or such circumstances brought to the knowledge of the subsequent purchaser or creditor, as would induce a prudent man to make inquiry before he acted, answers the object of the statute."

To illustrate this principle, I ask the Court to consider the principle of the case of *Kelly* v. *Morrison.*

In that case it was held that acts of possession, doubtful and somewhat remote in point of time, were sufficient to charge a purchaser with notice of an unrecorded deed. Why? Only because it was notice that he claimed some title. That constitutes the entire reason. How much more, then, should he be charged with notice if the party under whom he claims, to wit, the mortgagee, distinctly advises him that Breese claims some title. No one can say that the notice can be good and sufficient in one case and not in the other. No distinction in principle can be made between the cases.

I assume, then, that this case stands as it would stand if Breese's deed had been recorded after the mortgage to the United States and before the bill was filed. Then the case is precisely within the case of *Ohling* v. *Luitjens*, 32 Ill. 23. If Breese was not affected by the decree of sale, he is still the owner of the equity of redemption and entitled by his position to redeem this land. *And it is impossible to say that if Breese had a right of redemption at any time, he has lost it; and that he had a right of redemption at the time the bill was filed was admitted by making him a party to foreclose and asking a decree that his right of redemption be barred.*

If Breese had the right to redeem, then the plaintiff below cannot recover; for, although mortgagee may maintain eject-

ment after condition broken, in this case Laurison Riggs is not the mortgagee, and his purchase, under the sale, of a small portion of the mortgaged premises does not make him, in law, the assignee of the mortgagee, whatever may be the rule in equity, and to maintain ejectment a man must have a *legal* title; an equitable estate will not do. Besides, if ejectment could be brought by Riggs, as mortgagee, then Breese and his heirs must have the right to protect themselves by paying up the entire mortgage and calling upon all the owners of the land in the original mortgage for contribution, which manifestly cannot be done in this case.

But a still more conclusive answer to the right of Riggs to recover, as assignee of the mortgage, is: That if he is still the assignee of the mortgage at all, he is only assignee so far as this tract of land is concerned. His right in the mortgage was only to secure the portion thereof secured by this tract, as shown by the sale. This money has been duly tendered to him, and more too, and he may now receive the same at any time. If he had recovered in ejectment as mortgagee, his right to possession in the premises would cease as soon as the sum due him was tendered; such a tender, therefore, must defeat a recovery.

The Court, on the hearing, excluded the certified copy of the deed from Grundy County, upon the ground that it was a copy of a copy. This is expressly made evidence by the law of Feb. 14th, 1857.

2 Cooke's Statutes, 972.

I add some suggestions, in the nature of a reply, to the argument of counsel for defendant in error in the Court below.

It seems to be assumed that if it is not shown that the officers of the United States did known of the existence of Breese's deed at the time the mortgage *was given*, that the plaintiff ought to recover. But I submit that if the deed of

Breese had not been made until after the mortgage was made and recorded, and had then been executed and recorded before the bill was filed to foreclose the mortgage, Breese would have had an equity of redemption which could not be ignored, and he could redeem from the mortgage at any time before his right to do so was barred by a proceeding in Court, of which he had notice, or by the statute of limitations.

Second, If at the time the bill was filed the officers of the United States had notice of Breese's claim sufficient to put them upon enquiry, then the deed would have the same effect as if it had been recorded. This is well settled in Illinois and in nearly all the other states and Great Britain. It is possible that diligent search may discover an occasional authority in New England seeming to limit this doctrine, but there can be no doubt that the doctrine, as broadly as I state it, is the law of Illinois.

Now, when the bill was filed the United States officers knew that Breese had an interest that required to be barred by foreclosure and so stated in the bill. They certainly knew that this deed existed, or they knew enough to put them upon inquiry which would have disclosed it. *They knew Breese had a claim to the lands, for the bill discloses the fact.* Corcoran and Riggs, when they purchased, had notice of the same facts, for it is idle to say that they were not chargeable with notice of what was contained in the bill, and in the return of the sheriff on the writ. The position of Breese, then, as to them, is that of the owner of the equity of redemption not barred or foreclosed.

They were each chargable with notice that Breese had a claim to the land. If any inquiry had been made, the nature of Breese's claim would have appeared; he would have informed any inquirer; his place of residence was will known; his partners, E. D. Taylor and Seth Paine, lived in Chicago,—this fact we proved; or if the parties had looked at the records in

either Cook or Will counties, they would have read the deed. *They could not have examined the title to any tract of land they purchased in Cook or Will counties without receiving actual notice of this deed.* They did have notice. The government price for this land in 1836 was $1.25 per acre; in 1847 Corcoran bought for 35 cts. per acre. The price paid by him shows that he knew of the adverse claim of title. It is said Breese paid but $2000, but Breese purchased in 1839. Corcoran not till years afterwards, after the county seat of Grundy county was located near those lands. I am satisfied that the Court cannot hold that the notice in the bill that Breese had an interest that must be barred by foreclosure, was not a sufficient notice to put a prudent man upon inquiry as to the nature of the title. It would be, it seems to me, a clear denial of a principle now too well settled to be disturbed; nor can it be held, I think, that a party is not bound to take notice of the record in Court of proceedings under which his title is deduced. This principle is too well settled to need argument; no case can be cited to the contrary. I need only refer to the following cases among many:

*Campbell* v. *McCahan*, 41 Ill. 45.
*Taylor* v. *Hopkins*, 40 Ill. 442.
*Morris* v. *Hogle*, 37 Ill. 150.

"It is the settled doctrine in this state, and it is believed to be in Great Britain and the various Courts of the Union, that, under the registry laws, a notice of the prior conveyance is as effectual as the registry of the deed. The object of recording the deed being to give notice to the world of the purchaser's claim of title, when that end is attained, whether by recording, actual notice, or such circumstances brought to the knowledge of the subsequent purchaser or creditor as would induce a prudent man to enquire before he acted, answers the object of the statute."

*Morrison* v. *Kelly*, 22 Ill. 624.

Riggs cannot recover at law as mortgagor, because the law

knows but one way to assign a mortgage, and that has not been adopted in this case. The mortgage has never been assigned legally.

In equity, I grant that an assignment of so much of the sum secured by the mortgage as the United States bid for this tract, has been made to Corcoran; *but we have tendered him this money, which is more than twice the amount he gave for the land*, and with this he should be content. The amount we tendered was the bid of the United States, which was one dollar per acre. Corcoran long after gave but 35 cts. an acre. This tender is sufficient to bar the right of Riggs to recover at law as assignee of the mortgage.

*Voorhees* v. *U. S. Bank*, 10 Peters, 449.

It is argued at length that the recital of service in the decree is conclusive, and cases are cited from the Supreme Court of Ill. to sustain the position. These cases determine only this: That a recital in a decree that a party was served is *prima facie* evidence of the fact *when there is nothing appearing in the record to the contrary.* This is conclusively shown in the case of—

*Secrist* v. *Green*, 3 Wallace, 744.

In this case we prove affirmatively that only one summons was issued by producing a full record in which a perfect copy of every paper issued or filed in the case, and only one summons appears. That summons is set out in *hæc verba* in the record, and then the record says that summons was served on all the defendants; we produce the summons. That it is the same summons there is no doubt, for it is set out in full in the record, and the Marshal's return shows that it was not served on Breese. There can be no clearer proof.

B. C. Cook
Atty. for Pltffs. in Error.

# Supreme Court of the United States.

SAMUEL H. DALTON
*vs.*
AARON CAIN & SAMUEL COMBS.

*Error to the Circuit Court, Southern District of Illinois.*

Since my brief was printed in this case, and since the defendant in error filed his first brief, a decision has been made by the supreme court of the State of Illinois in the case of Samuel Dalton *vs.* George H. Erb *et als.*, (53 Ills., 289 and 290.) Since the decision referred to has been published, the attorney for the defendant in error has filed a supplemental brief, in which he insists that under the case cited "this case is adjudicated, so far as Illinois decisions are to be the test of real property law in the State of Illinois."

In my opinion the case cited as determining this case has no analogy to or bearing upon it whatever, and I ask the attention of the court to the point determined. In Dalton *vs.* Erb, the court decided two points: first, that a bill of review seeking to reverse a decree for errors apparent on the face of the record must be filed within five years from the time when the decree was rendered, and in that case nearly nine years had elapsed, and therefore the bill could not be sustained.

Second. That as to matters *dehors* the record alleged in the bill as a ground for setting aside the original decree and the title of defendants, the latter must be allowed to protect themselves under their color of title

and possession of more than seven years prior to the filing of the bill. Now all this has no bearing whatever upon the decision of the questions under discussion in the case at bar.

If it were true, as matter of fact, that the kind of title under which the defendants claimed the lands was the same in each case, then it might be claimed the supreme court of Illinois had decided that defendant had color of title in this case. But there is no analogy between this case and the case decided in 53d Illinois.

The party in the last case had purchased the land from Cockle as the agent of Jaquemart, *and had paid for it;* had filed his bill against the unknown heirs of Jaquemart, alleging his purchase *and payment* and the death of Jaquemart. *The court decreed a deed to Erb, which was made by the master.* The court thus holds that a deed purporting on its face to convey a present and perfect title is color of title under the statute, and that possession under such color and payment of taxes for seven successive years made a perfect bar to any suit to divert the possession. I have not doubted that this was the law. I freely admit it in this case. But how does it affect this case? In the case at bar the defendant had no deed—never had one; he never made payment for the land; he had only a bond for a deed, (it is very doubtful if he had that,) and the supreme court of Illinois always decided that a bond for a deed was not color of title.

I do not need either to question the assertion that a bond for a deed which is genuine and really executed by the obligor, or for him by an attorney under a valid power, coupled with full payment of the purchase money, would constitute "title in equity;" but in this case there was no bond for a deed executed under any valid power by Cockle. There was no full payment ever made; and if one man has a "title in equity" to the property of another, without his consent, simply because he has once

agreed to pay for it and has broken his agreement, then a "title in equity" is a very curious thing.

I repeat, there is nothing in the case of 53d Illinois which has the slightest bearing upon the questions involved in this case.

BURTON C. COOK,
*Counsel for Plaintiff in Error.*

# SUPREME COURT of the UNITED STATES.

*No. 323.*

SAMUEL DOLTON, *Plaintiff in Error,*

*vs.*

AARON CAIN AND HENRY COOMS, *Defendants in Error.*

ERROR TO CIRCUIT COURT OF THE UNITED STATES FOR SOUTHERN DISTRICT OF ILLINOIS.

ARGUMENT FOR DEFENDANTS IN ERROR.

# SUPREME COURT of the UNITED STATES.

*No. 323.*

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SAMUEL DOLTON, *Plaintiff in Error,*

*vs.*

AARON CAIN AND HENRY COOMS, *Defendants in Error.*

ERROR TO CIRCUIT COURT OF THE UNITED STATES FOR SOUTHERN DISTRICT OF ILLINOIS.

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## ARGUMENT FOR DEFENDANTS IN ERROR.

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This case was tried at Springfield, Illinois, on first Monday of June, 1868, before the Hon. Samuel H. Treat, District Judge and *pro tempore* sole judge of said Circuit Court for Southern District of Illinois, in the absence of the Hon. David Davis, one of the Justices of the Supreme Court of the United States, assigned to preside in said judicial circuit.

Dolton, who claims to be a citizen of the State of New York, sues Aaron Cain and Henry Cooms, citizens of the Southern District of the State of Illinois, in ejectment, the notice in ejectment being served on the 28th of March, 1865, as appears on page 2 of paper book. On the 14th of June, 1865, the declaration in this case was filed. On the 5th day of January, 1866, it was ordered by agreement that the declaration be re-filed as of that day, to-wit: the 5th of January, 1866. Afterwards pleas of not guilty were filed at June term, 1866, by both defendants, and a joinder thereon. A stipulation in writing was filed by Messrs. Grimshaw & Wheat, attorneys for defendants, to waive the intervention of a jury, and for trial to put themselves upon the Court. The Court heard the case and took time to consider. On the 22d of June, 1866, the Court being then sufficiedtly advised, finds the defendants not guilty of withholding unlawfully from plaintiff the possession of the premises in controversy, and adjudges against plaintiff the costs of defendant in said cause.

By agreement, a bill of exceptions was to be settled on or before the January term, 1867, of this Court. No bill of exceptions was then settled. On the 7th day of January, 1868, the costs having been paid up, according to the rules and practice of said Court, the said judgment was set aside and a new trial was awarded in said cause. A stipulation was filed, waiving a jury, and a new trial had, under the practice of said Court, without a jury, and on such re-trial the Court, after full advisement, found that the defendants were not guilty of the tresspasses in plaintiff's declaration complained of, and that they go hence without day with their costs. Plaintiff made a common law motion for a new trial, which was never pressed. On the 8th of January, 1869, he appears to have filed a bill of exceptions, see page 7, paper book, that shows—

1st. Patent for land in controversy from United States to Benjamin Stephenson, May 13, 1818.

2. Benjamin Stephenson to James McGuire, September 22, 1820.

3. James McGuire to Augustus R. Thiriat, dated 6th January, 1823, in trust, for Rene' M. F. Jacquemart.

4. Plaintiff proved the death of said Thiriat in the year 1845, and of said Jacquemart in 1848.

5. Plaintiff proved that the heirs of Thiriat and Jacquemart conveyed the land in controversy in 1864 to plaintiff, and closed his case.

It will appear by the testimony of Peter Hartman, [pages 9, 10, paper book,] that he knew the land in controversy; that he knew Cain, one of the defendants, who in February or March, 1849, took actual possession by residence on and of the land in controversy, and continued in possession of the land in controversy until the first of March, 1862, by actual residence thereon. That Cain, about the first of March, 1862, removed from said premises and placed tenants in possession by actual residence thereof, and since the time when he first took possession of said tract of land in 1849, he has under claim of title by himself and his tenants actually resided on said land.

The evidence of Samuel Miller shows, pages 10 and 11, that Aaron Cain, defendant, resided on said land by himself and his tenants continuously from February or March, 1849, up to the time of the trial of the case, claiming title thereto.

Washington Cockle states that he was the attorney of Tillon and Cutting by substitution, as an attorney in fact of Rene' Marie Ferdinand Jacquemart and Madame Adéle Louise Daulert d'Egligney, his wife. Letter of substitution dated 20th of September, 1847. The attorneys in fact, Tillon & Cutting, executed a power of substitution to Cockle, and by virtue of said power of substitution said Cockle states that he sold to Aaron Cain the land in controversy, to-wit: the south-west 10, town 2 north, range 7 west of 4th principal meridian, Adams county, Illinois, on 29th day of July, 1848, for the sum of three hundred dollars. Said Cockle further states that he made the said sale as attorney in fact for said Rene' M. F. Jacquemart and his wife; he further states that said Cain on the day of sale paid him one hundred dollars of the purchase money, and afterwards paid him one hundred and thirty-five dollars more of said purchase money, all of which said Cockle states he paid over on taxes on lands belonging to said Jacquemart, under instructions receiv-

ed from said Tillon & Cutting on said day of sale; and, as Mr. Cockle states, he on the day of sale executed a bond for a deed of said premises to said Aaron Cain. Mr. Cockle further states that a short time afterwards, not longer than one month, he reported said sale and the terms to Tillon & Cutting, and they immediately approved and ratified the sale.

Page 13, paper book. Aaron Cain, one of defendants, swears that he purchased the land in controversy of one Jacquemart, through Washington Cockle, his agent and attorney in fact. He states that he bought in good faith, believing that Cockle was his, Jacquemart's, legally appointed attorney in fact, and had full authority from Jacquemart to make said sale, and he still so believes. He states that he also believed, when he purchased, that Jacquemart was the owner of the land, and that Cockle had full authority, and was his legally appointed attorney in fact to make said sale. Said Cain states that early in 1849, either in the month of February or March of that year, he moved upon and took actual possession of said land under said purchase, actually resided on said land in his own person, and held possession and occupied the same as his residence and homestead from the aforesaid time, 1849, until the spring of 1862. In the spring of 1862 he leased the land to one Henry Teton for one year, to end March 1st, 1863. Teton immediately moved upon the premises, and lived there until about the first of March, 1863, as the tenant of Cain. Immediately when Teton moved off, Cain leased the land to one Feland, and without any interval of occupation, the said Feland moved on the land, resided upon it from the spring of 1863 until the first of March, 1864. Before Feland moved from the premises, Cain leased the land to Henry Cooms, who took actual possession by residence, as the tenant of Cain, and so continued until the first of March, 1865, when he moved off, since which time Cain states that, by himself and tenants, he has actually possessed by residence the land aforesaid. Cain further states that since the 29th day of July, 1848, he has always claimed to be the owner of said land; that he has paid all taxes on said land for the years from 1848 to the year 1865, both inclusive, with the exception of the year 1863, which taxes for the year 1863 he found paid by some one to him unknown.

On pages 14 and 15, paper book, there will be found the power of attorney of Monsieur and Madame Jacquemart to Tillon & Cutting, date, August 7, 1847, and on pp. 16 and 17, its authentication. The power of attorney contains a full power of substitution. On page 17 will be found, of date 20th September, 1847, a substitution by Tillon & Cutting, the parties named in the power of attorney, pages 14, 15, appointing Washington Cockle, under the power of substitution, attorney in fact for Jacquemart and his wife.

On page 18, paper book, Cockle, on 29th July, 1848, as attorney in fact for Jacquemart, agrees to convey the land in controversy to Aaron Cain aforesaid, for the sum of three hundred dollars, one hundred paid, and the rest, sixty-eight dollars in one year from first of November, 1849, and sixty-six dollars in two years from that date, sixty-six dollars in three years from date, all payable at Peoria, Illinois, with interest from date, and taxes to be paid by said Cain; Jacquemart to make to Cain and deliver a fee simple deed, upon the payment of the aforesaid installments; Cain to purchase or obtain possession of the improvements on the land at his own cost.

Cain further, p. 13, swears that he paid one hundred dollars of the purchase money to Cockle, that he paid also the deferred payments to Cockle as they same became due, except the last; that Cockle refused to accept the last payment, because of a rumor that Jacquemart was dead. Cain also swears that he has always been ready and willing to pay the balance of the purchase money, but that he did not know who was entitled to receive it. That he purchased in good faith and believed at the time of the purchase that Jacquemart was the owner of the land, and Cockle his legally appointed attorney in fact, with full authority to make the sale. He further swears that in February or March, 1849, he took possession by residence of said land under said purchase; that he actually resided upon it, by himself and tenants, up to the 28th of March, 1865, when suit was commenced, under the claim of title that he acquired from said Cockle. He continues by himself and tenants still to reside on said land. That by himself and tenants, as aforesaid, he has had actual possession of the land by residence at all times since

the month of February or March, 1849; that at all times since the 29th of July, 1848, he has claimed to be the owner, and as such owner, and under such claim, he paid all taxes assessed on said land, from and including the year 1848 up to and including the year 1865, to the proper officer authorized to collect the same, except that he went to pay the taxes for the year 1863 and found them paid.

On pages 14 and 15, paper book, will be found the power of attorney from Jacquemart and wife to Tillon & Cutting; it is dated 7th of August, 1847, contains full power to make sales of Jacquemart's lands in Illinois, and full power of substitution.

On the 20th day of September, 1847, Tillon & Cutting, under said power, appoint Cockle attorney in fact, page 17.

On page 18 will be found a bond for a deed, executed by Jacquemart, by Cockle as attorney through substitution, to Aaron Cain, dated 29th July, 1848, and conditioned for the conveyance to him of the land in controversy, on his paying the purchase money.

On page 19 will be found two sections of a statute of the State of Illinois, passed in 1835. These two sections were intended to protect, and do protect, as construed by the Supreme Court of the State of Illinois, any person who has resided upon land, by title deducible of record in law or equity, from the United States, or from any marshal, sheriff, or person authorized to sell for taxes, and from other officers and sources named in these sections, provided such residence, under the class of titles named in said sections, shall have been continued during seven successive years prior to the commencement of the suit.

The State of Kentucky in 1809 passed a similar law for the protection of occupants by residence under title deducible of record. The statute was construed by the Supreme Court of Kentucky, in the case of Poage's heirs vs. Chinn's heirs, 4 Dana R., 54, to embrace an equitable title, and that case in Dana will be found quoted approvingly in Collins vs. Smith et als., 18 Ill., page 160, *infra*. In Campbell vs. Quinlan, 3 Scammon's Illinois R., page 289, the Court say:

"It is a safe rule that when one State enacts a statute of an-

other State, it is presumed to adopt the construction which that statute has received by a uniform series of judicial expositions."

The case in 4 Dana has, as far as I can discover, remained the law of Kentucky.

I therefore now refer to the case of Margaret Collins vs. Hugh Smith et al., 18 Illinois, page 160, to show the construction of the two sections of the Illinois law, embraced in the bill of exceptions, and requiring residence for seven years to make a bar under the statute of limitation of 1835. The Supreme Court of Illinois say "that the Supreme Court of Kentucky, in Poage's heirs vs. Chinn's heirs, 4 Dana, 54, construed a similar statute of Kentucky of 1809 to embrace an equitable title, and allowed that title to be proved by such evidence, parol or otherwise, as was proper to establish the several links in the chain." The Supreme Court of Illinois, in the case of Collins vs. Smith above referred to, adopt approvingly the case in 4th Dana, and say: "If the language of the act, *having a connected title in law or equity deducible of record*, cannot be made to embrace this title in equity by resulting trust, it must be excluded by construing the phrase 'deducible of record' to apply to each link in the chain. This," the Supreme Court of Illinois say, "is not the sense of the provision. If the foundation, source, or beginning of the title under which the party claims and enters, is of record, that is, by grant of this State, or of the United States, or by grant of a public officer, or an execution, or under order of court, judgment, or decree of a court of record, then it is 'deducible of record' to every person who can connect himself with it by such proofs as are competent for any purpose to establish the kind of title under which he claims. We know that in showing connected title for recovery in ejectment, we have frequently to weld in a link by parol, for a descent and heirship, and possession of the tenant under such title, and such like instances. And although an equity link would not sustain an ejectment suit, under the statute, it may defeat it, and so may be put in by parol evidence, when it is of a character to be established by that character of parol proof, and the Court say we have shown that a resulting trust is an exception from the statute of frauds." "In Poage's heirs vs. Chinn's heirs, the Court gave a

like construction to their [the Kentucky] act, as only requiring the title from the commonwealth to be of record, and the remainder of the chain to be proved as the nature of the title should require. This is a sound and reasonable interpretation and one calculated to give effect to every provision. The Court is not able to perceive how the contrary one could prevail, without cutting off heirs from the benefit of the defense, because the descent and heirship could not become matters of record, so as to become record evidence."

The Supreme Court of Illinois reversed the judgment in the Collins case, and remanded it for a new trial, because the Circuit Court erred in excluding a witness, called for the purpose of testifying in Mrs. Collins' behalf, to connect her with the title of record, and thus enable her to avail herself of the act of 1835, two sections of which are embodied in the bill of exceptions.

It will be insisted that the Supreme Court of the United States will not, in an action of ejectment, recognize an equitable title. That may be correct, when an offensive title is sought to be used by a plaintiff in ejectment, which title is deduced through an equity. The reason is plain; in order to recover, the plaintiff must have the paramount legal title. When, however, we are to ascertain the law of defense, we look to the statute of the State, and the construction of its limitation laws by the courts of the State wherein the suit arose. This is no attempt to recover in ejectment on an equitable title, but defendant having shown a record foundation, has a clear right to deduce for the purpose of defense an equitable title, as is shown by the cases cited.

The right of every State to pass limitation laws at the discretion of its legislature, has always been recognized. There is no limit to the power but the Constitution of the United States and of the State.

I refer also to the case of McCormick vs. Evans, 33 Illinois, 328. In that case, plaintiff, McCormick, traced title from United States to Broderick, and from Broderick to plaintiff. The defendant, Evans, set up a defence under limitation law of 1835.

He proved actual residence on the land for seven years prior to the time when suit was brought. His paper evidence was an agreement for a deed from John Broderick to Esau Pickerel and John M. Walker, dated July 19, 1838; also a deed from Esau Pickerel to Walker, and a deed from Walker to Philip Greno; also, a contract between Walker and Greno to convey the land in dispute and furnish him the patent title; also, an assignment from said Greno to said defendant, Evans, of said contract. The Court said that twenty years from the time when the money became due to Broderick, under the agreement of the 19th of July, 1838, having elapsed, they would presume that that agreement was paid up. The Court further say that under the assignment from Greno to Evans, the defendant, such an equitable title was created as would have been enforced in a court of equity, and such a one as constituted a defense under our statute of limitation of 1835; and that the possession from the time that the assignment was delivered was such as the statute of 1835 required, and with residence as proved, constitutes a bar under act of 1835. The case was reversed on a technical point.

It is insisted, then, for the defense, that the foundation of the title is of record, and title in equity clearly deduced into defendants, starting from the same source as the title of plaintiff, but showing under the limitation act of 1835 a title in equity older than the pretended legal title of plaintiff, and backed by seven years' residence.

The Court will find on page 19, paper book, another limitation law, commonly known in Illinois as the limitation act of 1839; the part of the law in the paper book is the first section, and applies to a defense under claim and color of title, made in good faith, and seven years' possession and payment of taxes under the title.

The question of good faith does not arise in this case. The current of decisions in Illinois is, that under this statute good faith will be presumed until attacked, and then the question of good faith may become a question of fact to be tried by a jury. No issue has been made on the good faith of defendants. There

can be no question but that full proof was made of occupancy, possession, even residence on the land for seven years prior to the suit. All these facts are proved fully. It is also distinctly proved that Cain paid taxes under the title offered in evidence for seven successive years prior to the suit, that is to say from 1848 to 1862, both inclusive; see page 14, paper book.

The contract, or bond for a deed, dated 29th July, 1848, [see page 18, paper book,] executed by Cockle as attorney in fact for Jacquemart, was, in the eye of the act of 1839, claim and color of title, made in good faith. The case of Irving vs. Brownell, at December term of Supreme Court of Illinois, 1849, see Irving vs. Brownell, 11 Illinois, page 402, decided that an auditor's deed under the tax law of 1827, having previously been declared to be void by the Supreme Court of the State of Illinois, when sought to be used as title by plaintiff in ejectment, could not be used by Brownell as a defense under the act of 1839; that a void deed was not color of title and could not be used as a bar; that color must have *prima facie* appearance of title.

The limitation law of 1839, as construed in Irving vs. Brownell, continued to be the law of Illinois until the June term of Supreme Court of Illinois, 1855, when the decision of that Court in Woodward vs. Blanchard overruled the former case, and in 16 Illinois, page 430, in the latter case, the Court say: "Our statute requires this color of title to be accompanied by a written evidence, a paper title." * * "It must be in good faith, honestly. Defects in the title may not be urged against it as destroying the 'color.'" The legislature by act of 1839, the Court says, extend the protection of the act to all who might have claim and color of title in good faith, although it might not be connected or deducible of record from the particular sources. The color must be on paper, and possession and payment of taxes must be shown. The Court decides that the phrase "claim and color of title" was used in the act of 1839 in the same sense that the courts in Illinois and in other States had used it, when applying it to twenty years limitation laws. The same kind of paper claim and color, backed by possession and payment of taxes for seven successive years, will pro-

tect occupant as under twenty years laws—the first section of act of 1839 only adding to possession payment of taxes.

If this reasoning and its conclusions be correct, the Court repeat that the same kind of claim and color, if in paper title, supported and accompanied by actual possession and payment of taxes legally assessed for seven years, will protect the party under the seven, as would be the case under the twenty years laws, without these additional facts being proved.

The Court in the case of Woodward vs. Blanchard cite a number of cases in support of the position that any paper title may become color.

A grant from the State held to be color under a seven years law, whether voidable or void.

Moody vs. Fleming, 4 Ga., 118, 120.

In Bradstreet vs. Peterson, 5 Peters, 446, it is said [illegible] of statute originates in wrong. So a deed void for [illegible] vendor may give color. See on this point:

Gregg vs. Lessee of Sayre and wife, 8 Peters, 253.

Although grantee may be under a mistake in supposing his grantor had title, yet such conveyance may confer g[illegible] title on him.

Bogardus vs. Trinity Church, 4 Paige, 200.

See also in support of same doctrine—

Riggs et al. vs. Dooley et al., 7 B. Monroe, 238.

Taylor vs. Buckner, 2 A. K. Marshall, 19.

Roberts et al. vs. Saunders et al., 3 A. K. Marshall, 29.

The same principle has been repeatedly decided in Pennsylvania—

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In Goewy vs. Urig, 18 Illinois, page 242, the Court say: "The simple production of a deed from the auditor on a tax sale under the act of 1827 is not sufficient; the party relying upon it must show a compliance with the prerequisites of the statute, when it is relied on as title.

Garrett vs. Wiggins, 1 Scammon, 335.

But though void, it may be color of title under the statute of limitations, when held in good faith," and Court cite—

Woodward vs. Blanchard, 16 Illinois, 424.

In McConnell vs. Street, 17 Illinois, 253, McConnell defended under a single deed from Arnett to him as color.

McClellan vs. Kellogg, 17 Illinois, 501, re-approves Woodward vs. Blanchard.

Darst vs. Marshall, 20 Illinois, 234.

Defense under act of 1839 was made through a contract for a deed, and sustained in that case.

A deed of release of a mortgage, or any instrument indicating an intention to pass a title from one person to another, gives color to land described.

McCagg vs. Heacock, 34 Illinois, 478.

Both parties in this case claim through Jacquemart, whose title originated from the United States. Defendants' color of title, and equitable link in chain of title deducible of record, originated in the bond or contract for a deed, set out on page 18, paper book, dated 29th July, 1848, executed by Cockle as attorney in fact for Jacquemart [erroneously printed in paper book Jacquemard], Cockle acting under letter of substitution from Tillon & Cutting, attorneys in fact for Jacquemart. Plaintiff claims under a deed from the heirs of Jacquemart, dated 27th June, 1864, and from the heirs of Thiriat, dated 17th June, 1864, long subsequent to contract. Defendant Cain, and through whom the other defendant claims, is prior in time, and by virtue of limitation laws, prior in right.

If notice has any bearing upon the questions submitted in

this case, plaintiff had abundant notice of Cain's rights. Cain resided on the land from 1849, and by himself and tenants continued to reside on the land until this suit was brought.

I do not think that notice, so called, has anything to do with the case, it is a question of bar or prescription by limitation. I refer, however, on the question of notice, to—

Williams vs. Brown et als., 14 Illinois, 201.

The Court say: "The purchaser of real estate is bound to inform himself as to what interest the party in possession claims, and it makes no difference whether he originally entered as a tenant or otherwise; his possession is constructive notice of his rights in the premises, unless he fails to state them when enquired of."

With these views, I think the judgment of the Circuit Court should be affirmed.

JACKSON GRIMSHAW,
*Attorney for Defendants in Error.*

ERROR TO CIRCUIT COURT — SOUTHERN DISTRICT OF ILLINOIS.

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*SUPREME COURT of the UNITED STATES.*

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SAMUEL H. DALTON,

*vs.*

AARON CAIN and SAMUEL COMBS.

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I must apologize for my trespass upon the Court. But I suppose that where a rule of property is settled by a local court, the Supreme Court of the United States will not decide counter to the decision of the local courts.

On the moment of the submission of the case of Dalton, plaintiff in error, vs. Cain et als, defendants in error, I find a case of the same class of titles decided by the Supreme Court of Illinois, and just published, settling the local law, so far as regards the local limitation law of 1839, sec. 1, to-wit: Color of title, made in good faith, possession and payment of taxes under first section of the act of 1839. I now submit the cases, but the authority, while not binding, is a rule of property that must be respected, and late as it has come to me, it is due to the Court to make an additional reference. The opinion reached me on yesterday, December 27th, 1871.

I refer to case of Samuel Dalton vs. George H. Erb et als, 53 Ill., pages 289 and 290, error to McDonough County, decided by the Supreme Court of Illinois, January term, 1870.

The Court, Justice Lawrence, now Chief Justice, say that "Erb, one of appellees, bought of Cockle, acting as attorney in fact, and for one Jacquemart, a tract of land owned by the latter. He paid contract price * * * Dalton, as in this present case, claimed through heirs of Jacquemart. Defendants, in addition to other defences, set up payment of taxes under purchases, and possession for more than seven years."

The Court, on page 290, 53 Ill. Reports say * * * * The latter defendants, must be allowed to protect themselves under their color of title, possession and payment of taxes for more than seven years. * * * Court further says these facts were proven, and their possession was adverse as settled in Chickering vs, Failes, 26 Ill., 516, Cook vs. Norton, 48 Ill., 20. See also Louis M. F. Jacquemart vs. George H. Erb, 53 Ill., 291. So far as Illinois decisions are to be the test of real property law in the State of Illinois, this case is adjudicated.

JACKSON GRIMSHAW,

*Attorney for Defendants in Error.*